Supreme Court, U.S.
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In The

Supreme Court of the United States

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October Term, 1997

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON and CERTAIN LONDON MARKET INSURANCE COMPANIES,

Petitioners,

vs.

INDIANA GAS COMPANY, INC., RICHMOND GAS CORPORATION d/b/a INDIANA GAS COMPANY, INC. and TERRE HAUTE GAS CORPORATION d/b/a INDIANA GAS COMPANY, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a court may consider, for purposes of determining jurisdiction under 28 U.S.C. § 1332, only the citizenship of the Active Underwriter of a Lloyd's Syndicate, or whether the citizenship of every defendant Underwriter must be considered;

2. Whether, for purposes of determining jurisdiction under 28 U.S.C. § 1332, the Active Underwriter of a Lloyd's Syndicate may be designated as a Representative of the other Names of his or her Syndicate pursuant to Fed. R. Civ. P. 23.2.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, the Home Insurance Company, Ranger Insurance Company, St. Paul Fire & Marine Insurance Company and St. Paul Surplus Lines Insurance Company were parties before the court of appeals.

Certain London Market Insurance Companies appear as follows:

1. Accident & Casualty Insurance Company of Winterthur
2. Alba General Insurance Company, Ltd.
3. Allianz International Insurance Company, Ltd.
4. Anglo French Insurance Company, Ltd.
5. Argonaut Northwest Insurance Company
6. Anglo Saxon Insurance Association, Ltd.
7. Assicurazioni D'Italia
8. Assurances Generales de France (UK) IART
9. Baloise Fire Insurance Company, Ltd.
10. LaBelgique Industrielle
11. Bishopsgate Insurance Company, Ltd.
12. British Aviation Insurance Company, Ltd
13. British Merchants' Insurance Company, Ltd.
14. British Northwestern Insurance Company, Ltd.
15. British Reserve Insurance Company, Ltd.
16. City General Insurance Company
17. CNA Reinsurance of London, Ltd., now known as CNA International Reinsurance Company, Ltd.
18. Continental Insurance Company, Ltd.
19. Comphania Imperio Lisbon
20. Delta Lloyd Non-Life Insurance Co.
21. Dominion Insurance Company, Ltd.
22. Economic Insurance Company, Ltd.
23. Edinburgh Assurance Company, Ltd.

24. Elders Insurance Company, Ltd.
25. European General Reinsurance Company, Ltd.
26. Ennia (United Kingdom)
27. Excess Insurance Company, Ltd.
28. Fidelidade Insurance Company also known as Fidelidade Grupo Segurador
29. FM Insurance Company, Ltd.
30. Assicurazioni Generali di Trieste e Venezia
31. Groupe Josi per Thilly Re, Belgium
32. Guildhall Insurance Company Ltd.
33. Helvetia Accident Swiss Insurance Company
34. Highlands Insurance Company, Ltd.
35. Home & Overseas Insurance Co. Ltd.
36. Iron Trades Mutual Insurance Company, Ltd. (Now known as Iron Trades Insurance Corp. Ltd.)
37. The Insurance Corporation of Ireland
38. INSCO, Ltd.
39. Insurance Company of North America (United Kingdom), Ltd. (Aviation account)
40. International Surplus Lines Insurance Company
41. Lincoln Insurance Company, Ltd.
42. Lloyd Italico Assicurazioni
43. London & Edinburgh General Insurance Company, Ltd.
44. London & Hull Maritime Insurance Company, Ltd.
45. Mercantile & General Reinsurance Company plc.
46. Minster Insurance Company, Ltd., now known as GAN Insurance Company, Ltd.
47. National Casualty Company
48. National Casualty Company of America, Ltd.
49. National Security Fire and Casualty Company
50. Ned Lloyd Non Life
51. Norwich Trust Aviation Account
52. New India Assurance Company, Ltd.
53. Odyssey Re London, Ltd.
54. Prudential Assurance Company, Ltd.

55. Reasseguradura Nacional de Venezuela
56. Reliance Fire & Accident Insurance Corporation, Ltd.
57. LaReunion Francaise
58. River Thames Insurance Company, Ltd.
59. Road Transport & General Insurance Company, Ltd.
60. Royal Scottish Insurance Company, Ltd.
61. Royale Belge per Thilly Re, Belgium
62. Scottish Lion Insurance Company, Ltd.
63. Southern Insurance Company
64. St. Katherine Insurance Company Ltd.
65. Storebrand Insurance Company (United Kingdom), Ltd.
66. Stronghold Insurance Company, Ltd.
67. Swiss National Insurance Company, Ltd.
68. Switzerland General Insurance Company (UK), Ltd.
69. Swiss Union General Insurance Company, Ltd.
70. Taisho Marine & Fire Insurance Company (UK), Ltd.
71. Terra Nova Insurance Company, Ltd.
72. Threadneedle Insurance Company, Ltd.
73. Trent Insurance Company, Ltd.
74. Turegum Insurance Company, Ltd.
75. Ulster Marine Insurance Company, Ltd.
76. Unionamerica Insurance Company Ltd.
77. Unione Assurances de Paris
78. Utility Services Insurance Company (USICO)
79. Vanguard Insurance Company, Ltd.
80. Victory Insurance Company, Ltd.
81. Westminster Aviation Insurance Group
82. World Auxiliary Insurance Corporation, Ltd.
83. World Marine and General Insurance Company, Ltd.
84. Yasuda Fire & Marine Insurance Company (U.K.), Ltd.

Petitioners' full Rule 29.6 Statement is attached as a lodging and submitted herewith.

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5 James W. Moore, *et al.*, *Moore's Federal Practice* §§ 23.2.06-23.207 (3d ed. 1997) 22

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Petitioners, Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies, respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case. As shown below, that decision is in direct conflict with the decision of at least one other federal circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported as *Indiana Gas Co. Inc. v. Home Ins. Co.*, 141 F.3d 314 (7th Cir. 1998) (App. A), along with the denial of the Petition for Rehearing (App. C). The opinions of the district court are reported as *Indiana Gas Co. Inc. v. Aetna Cas. & Surety Co.*, at 946 F. Supp. 627, 946 F. Supp. 634, 951 F. Supp. 759, 951 F. Supp. 767, 951 F. Supp. 773, 951 F. Supp. 780, 951 F. Supp. 790, 951 F. Supp. 797, 951 F. Supp. 806, 951 F. Supp. 811 and 951 F. Supp. 816 (N.D. Ind. 1996). The five opinions from which Indiana Gas appealed are included in the Appendix to this Petition (App. B).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered April 6, 1998. The court of appeals denied a timely Petition for Rehearing on May 13, 1998 (App. C).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION AND RULE INVOLVED

28 U.S.C. § 1332 provides, in relevant part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy

> exceeds the sum or value of [$50,000*], exclusive of interest and costs, and is between —
>
> 1. citizens of different States;
>
> 2. citizens of a State and citizens or subjects of a foreign state;
>
> 3. citizens of different States and in which citizens or subjects of a foreign state are additional parties; . . . .
>
> . . . .
>
> For the purposes of this section . . . an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

Rule 23.2 of the Federal Rules of Civil Procedure provides:

> An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e).

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[*] At the time the action was commenced, the jurisdictional amount was $50,000.

STATEMENT OF THE CASE

A. Background

The Petitioners believe it might be helpful to the Court to briefly explain the background of Lloyd's and the London insurance market.[1]

Lloyd's is not itself an insurance company; rather it is a market place where the business of insurance is carried on by individual investors/subscribers called "Names." For administrative ease, the individual Underwriters are organized into Syndicates wherein each Underwriter agrees to accept a specific proportion of the Syndicate's liabilities. In turn, in underwriting insurance, each Syndicate assumes a specific percentage of the particular risk insured.

An entire policy's limits, or only a portion thereof, may be placed with Underwriters at Lloyd's, London. In the latter instance, the balance of the policy limits may be placed in whole or in part with insurance companies operating in the London insurance market, and/or with other insurance companies, including American insurance companies. The obligation of each Name and each Company on each respective policy is several and not joint, and each such Name and/or Company agrees only to be bound for his or its own percentage of liability, and is not responsible for the obligation of any co-insurer.

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[1] A good discussion of the London insurance market, including Lloyd's, may be found in *Edinburgh Assurance Co. v. R.L. Burns Corp.*, 479 F. Supp. 138, 144-46 (C.D. Cal. 1979), *aff'd in relevant part*, 669 F.2d 1259 (9th Cir. 1982). These pages are reprinted at App. F. The court of appeals was invited to take notice of this case in the jurisdictional memorandum filed after oral argument. *See infra* p. 9. The court's attention was also invited to the record below, District Court Record Docket Entry No. 387, Plaintiff's First Set of Interrogatories, London Market Insurers' Response to Interrogatory No. 8, pp. 33-34, which supported the *Burns* description of the London insurance market.

The business of each Syndicate is operated by a Managing Agent which appoints an Active Underwriter (who is one of the Names in the Syndicate) to accept risk on its behalf and manage the Syndicate's affairs. Each Name delegates complete control of his insuring activities to the Managing Agent. The Active Underwriter, as an employee of the Managing Agent, has control over various accounts in which the funds established for the payment of claims and discharge of underwriting liabilities are held in trust for the Names. The Names, by virtue of their contracts with the Managing Agents, are barred from participating in the operation of the syndicate's business, including underwriting, claims handling, and capital investment. In light of their exclusive control over the Names' accounts and the prohibition against control by the individual Names over any aspect of the insurance business, London Market Insurers contend that the Active Underwriter of each involved syndicate is the real party to the controversy for the purposes of litigation.[2]

In this case, the Petitioners subscribed policies in favor of the plaintiffs below over several decades. There were, accordingly, hundreds of Names and scores of companies alleged to be liable on the over one hundred twenty contracts of insurance at issue.

B. Proceedings in the District Court

On April 14, 1995, plaintiff Indiana Gas Company Inc. and two of its wholly-owned subsidiaries, Richmond Gas Corporation and Terre Haute Gas Corporation (collectively "Indiana Gas"), commenced this action. Suit was brought in the United States District Court for the Northern District of Indiana against seventeen insurers for breach of contract and for a declaratory judgment as to their obligations to defend and/or indemnify Indiana Gas, or predecessor companies, for alleged pollution liabilities arising out of nine former manufactured gas plants in Indiana.

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[2] Although arriving at the wrong result, the New Jersey District Court decision in *Lowsley-Williams v. North River Ins. Co.*, 884 F. Supp. 166, 167-68 (D. N.J. 1995) provides a good explanation of the relationship of the Active Underwriters to the Names. The relevant pages of *Lowsley-Williams* are reprinted at App. F. A copy of the joint stipulation of facts and exhibits filed in the *Lowsley-Williams* case was filed with the court of appeals as part of the jurisdictional memorandum submitted post-argument. *See infra* p. 9.

The Complaint invoked the diversity jurisdiction of the district court and alleged that Indiana Gas, Richmond Gas, and Terre Haute Gas were all Indiana corporations with their principal place of business in Indiana.[3]

The Complaint also alleged as follows:

> Upon information and belief, defendant Certain Underwriters at Lloyd's, London ("Lloyd's") is comprised of certain syndicates which are located in and have their principal place of business in London, England . . .

In their Amended Answer, London Market Insurers[4] ("LMI") responded to this allegation, in relevant part, as follows:

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[3] No party disputed, or now disputes, the citizenship of the plaintiffs below.

[4] "London Market Insurers" was used as a collective reference for those Certain Underwriters at Lloyd's, London and certain solvent and represented London Market Insurance Companies, who or which severally subscribed, each for his or its own proportionate share, (and not one for the other) to one or more of the insurance policies at issue in the case.

All but five of the "London Market Companies" were foreign insurers. None of the five domestic United States insurance corporations who participated in the London Market Insurance policies at issue was incorporated or had its principal place of business in Indiana.

> London Market Insurers admit that those certain and indentified Underwriters of Lloyd's, London, who subscribed those policies of excess liability insurance set forth in Exhibit A, are individuals who are members of various Syndicates which are located in and have their principal place of business in London, England
> . . .

A copy of the relevant pleadings may be found at App. D.

Trial was originally scheduled for October 21, 1996. Discovery concluded in early June 1996, and fourteen dispositive motions were fully briefed on August 9, 1996. At the time of briefing, and after court-ordered mediation, five defendants were left as parties: Aetna Casualty & Surety Company ("Aetna"), Home Insurance Company ("Home"), Ranger Insurance Company ("Ranger"). St. Paul Fire & Marine Insurance Company and St. Paul Surplus Lines Insurance Company (collectively "St. Paul") and London Market Insurers. At a pre-trial hearing on September 5, 1996, Chief Judge Lee promised a decision on the motions by the end of September, and adjourned trial until January 21, 1997.

On October 2, 1996, the district court handed down a series of opinions that decided twelve of the pending motions. Eleven opinions are reported; the motions are listed below, along with the parties joining and the disposition.[5]

Reported At	*Motion*	*Movant*	*Disposition*
946 F. Supp 627	No Case or Controversy at Seven Sites	All Defendants	Granted

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[5] By order dated October 2, 1996, the district court denied one motion as moot; on October 1, the court had requested further briefing on another motion, which never was decided. The two motions for summary judgment on the pollution exclusions were decided together.

Reported At	*Motion*	*Movant*	*Disposition*
946 F. Supp. 634	Late Notice	All Defendants	Denied
951 F. Supp. 759	Bad Faith/ Punitive Damages	Only Aetna	Denied
951 F. Supp. 767	Property Damage During Policy Period at Seven Sites	All Defendants except Home	Granted
951 F. Supp. 773	Number of Occurrences/ Presence of Aggregates	Only Aetna	Granted as to Aggregates Only
951 F. Supp. 780	No Fortuitous Accident or Occurrence	All Defendants	Granted
951 F. Supp. 790	Expected and Intended Property Damage	All Defendants	Denied
951 F. Supp. 797	ISO Pollution Exclusion	All Defendants	Granted
	London Market Pollution Exclusion (NMA 1685)	London Market Insurers only	Granted

Reported At	*Motion*	*Movant*	*Disposition*
951 F. Supp. 806	Property Damage at Greencastle and Marion	All Defendants except Ranger And St. Paul	Denied
951 F. Supp. 811	St. Paul Excess Policies	St. Paul only	Granted
951 F. Supp. 816	As Damages	All Defendants	Denied

The granting of the motions effectively terminated the litigation in the defendants' favor, with the exception of a bad faith claim against Aetna, Indiana Gas Company's primary insurer, which remained pending.

After the motions were decided, but prior to the entry of judgment, Aetna settled with Indiana Gas and was dismissed from the case.

Judgment was thereafter entered, and an appeal was taken by Indiana Gas.

C. Proceedings in the Court of Appeals

Indiana Gas filed a notice of appeal on January 8, 1997. Believing the judgment not in proper form, the defendants below moved to alter or correct the judgment under Fed. R. Civ. P. 59(e) or 60(e). The district court amended the judgment on February 10, 1997, implicitly disposing of the motion. Indiana Gas thereafter filed another notice of appeal. Both appeals were subsequently consolidated by the Seventh Circuit, and the appeal was fully briefed on November 10, 1997. Oral argument was held on January 6, 1998.

The appellants' counsel had no sooner begun his argument when the court inquired as to the citizenship of the Lloyd's Underwriters. Since that was the first time subject matter jurisdiction had been questioned, the parties were not prepared to address the issue at the hearing and argument on the merits continued. The court thereafter invited briefing on the jurisdictional question, and invited the parties to amend their pleadings under 28 U.S.C. § 1653, or alternatively invited Indiana Gas to dismiss Underwriters as parties. A copy of this order may be found at App. E. Both Indiana Gas and LMI filed memoranda addressing the question, each contending that the court had subject matter jurisdiction.

In their jurisdictional memorandum, LMI contended that, because of the unique structure of the Lloyd's Market, the Active Underwriter of each Syndicate was the real party in controversy for purposes of diversity, and only the Active Underwriter's citizenship was determinative. LMI moved to amend their Amended Answer to more particularly allege the relationship of the Active Underwriter to the Names in a Lloyd's Syndicate. Counsel for LMI also explained, in a declaration, the steps undertaken to ascertain whether any of the Names was a citizen of Indiana as of the commencement of the action. There was, in fact, one identified Indiana Name.[6]

Indiana Gas, in its jurisdictional memorandum, offered to dismiss any Indiana Names from the litigation.

The Seventh Circuit, in a 2-1 decision, held that the Syndicates were unincorporated associations (a finding directly opposed to the position taken by LMI). The court then reasoned that, since the Syndicates were not corporations, the citizenship of each member had to be considered for diversity purposes. Moreover, the court held that since the Names were not parties in their own right, Indiana Gas could not dismiss individual Names to preserve jurisdiction. As there was one Indiana Name, the Seventh Circuit reversed the judgment of the district court and ordered the judgment vacated and the action dismissed. Rejecting LMI's analogy of the Syndicates to the business trusts at issue in *Navarro Savings Ass'n v. Lee*, 446 U.S. 458 (1980) ("*Navarro*"), the panel held that this Court's decision in *Carden v. Arkoma Assocs.*, 494 U.S. 185 (1990) ("*Carden*") was dispositive.

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[6] On January 27, 1998 LMI filed a submission pursuant to the court's order of January 6, 1998 concerning jurisdiction. As part of the submission, LMI filed a copy of the joint stipulation of facts and supporting documentation filed in the *Lowsley-Williams* case, *supra*, note 2. That stipulation was offered to the court as being representative of the facts concerning the relationship between the Active Underwriters and the names in this case, *mutatis mutandis*.

In specifically rejecting the Sixth Circuit's holding in *Certain Interested Underwriters at Lloyd's, London v. Layne*, 26 F.3d 39 (6th Cir. 1994) ("*Layne*") (citizenship of the Active Underwriter controlled for diversity purposes), the panel recognized that its decision created a circuit conflict, and therefore circulated the opinion to all judges in active service for *en banc* consideration prior to its release, pursuant to 7th Cir. Rule 40(e). *See Indiana Gas*, A-11. A majority did not favor *en banc* review.

LMI thereafter filed a timely motion for panel rehearing. Since the court, in rejecting LMI's contention, held that the Lloyd's Syndicates were unincorporated associations, LMI requested that consideration be given to Fed. R. Civ. P. 23.2, thus permitting the Syndicates to be treated as a class or classes. Because the Active Underwriters were all diverse from the plaintiffs, complete diversity would then exist under *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921) ("*Cauble*").

By Opinion dated May 13, 1998, the panel majority denied the petition.[7]

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[7] Circuit Judge Evans, who had dissented from the original decision, voted against the rehearing petition, but did not join in the panel's opinion.

Although the court ruled that LMI had waived the right to seek class action treatment by failing to include such a request in their jurisdictional memorandum,[8] the panel also ruled on the merits of the class action question. The panel held that Lloyd's Syndicates could not be treated as a class, as the Active Underwriters did not have claims of their own, but only claims as members of the Syndicates.

REASONS FOR GRANTING THE WRIT

The immediate question presented in this case is whether a federal forum is available to Lloyd's underwriters and their American policyholders for resolution of contractual disputes — an issue that has divided the lower courts over the last decade. Moreover, this case also presents larger issues of the nature and the identity of the real parties to the controversy, and (if Petitioners' first argument is rejected) of the use of Fed. R. Civ. P. 23.2 as a vehicle to resolve certain commercial disputes. These issues have attracted much scholarly commentary: G. David Porter, *"Incorporating" Limited Partnerships into Federal Diversity Jurisdiction: Correcting Carden v. Arkoma Associates*, 65 Notre Dame L. Rev. 287 (1990); John McCormack, *Carden v. Arkoma Associates: The Citizenship of Limited Partnerships, Associations, and Juridical Entities — A Chilling Future for Federal Diversity Jurisdiction*, 27 New Eng. L. Rev. 505 (1992); Charles A. Szypszak, *Jural Entities, Real Parties in Controversy and Representative Litigants: A United Approach to the Diversity Jurisdiction Requirement for Business Organizations*, 44 Me. L. Rev. 1 (1992).

The issue arises in the context of the diversity jurisdiction conferred by 28 U.S.C. § 1332. As part of the dramatic increase in insurance litigation in the last twenty years, Underwriters at

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[8] Such a request had not been made since unincorporated association status for the Syndicates had been specifically denied by Underwriters.

Lloyd's have frequently been involved as defendants in "long-tail" insurance claims. If the decision below is not reversed, these Underwriters, almost all of whom are aliens and who therefore clearly deserve the protections of a federal forum under the diversity jurisdiction,[9] will be denied that protection.

I.

THE PETITION SHOULD BE GRANTED TO RESOLVE THE CIRCUIT CONFLICT REGARDING THE APPLICATION OF THE DIVERSITY REQUIREMENT TO LLOYD'S UNDERWRITERS.

This Court should grant the petition to resolve the conflict between the Sixth and Seventh Circuits as to the requirements for Lloyd's Underwriters to establish diversity jurisdiction — a conflict that will inevitably cause uncertainty in other courts. The Seventh Circuit acknowledged that its decision created such a conflict. *Indiana Gas*, A-11.

Guidance from this Court is plainly needed. The issue of the diversity of Lloyd's Underwriters has been the subject of at least eleven opinions in the district courts over the last ten years, *see*, *e.g.*, *K. Bell & Assocs. v. Lloyd's Underwriters*, 1998 W.L. 274346 (S.D.N.Y) at *4, and cases cited therein. An entire subsection of a leading treatise is devoted to this issue. 15 James W. Moore, *et al.*, *Moore's Federal Practice* § 102.57[4] (3d ed. 1997).

The Seventh Circuit acknowledged that courts were split over this question, with some analogizing the Active Underwriters of the Syndicates to trustees, similar to those discussed in *Navarro*, while others treated the Syndicates as partnerships under *Carden*. *Indiana Gas*, A-10.

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[9] Diversity jurisdiction over aliens provides the federal courts with a "protective jurisdiction over matters implicating international relations where the national interest is paramount." *Sadat v. Mertes*, 615 F.2d 1176, 1182 (7th Cir. 1980).

The Second Circuit has also acknowledged the difference in approach without deciding it. *Advani Enters., Inc. v. Underwriters at Lloyds*, 140 F.3d 157, 160-61 (2d Cir. 1998). The issue is being briefed in two appeals pending in the Third Circuit, *Chemical Leaman Tank Lines, Inc. v. The Aetna Cas. & Surety Co.*, Nos. 97-5735, 97-5736 (Docketed November 25, 1997) (to be argued September 15, 1998); *GAF Corp. v. Hartford Acc. & Indem. Co.*, No. 98-5073 (Docketed January 21, 1998), (to be argued September 15, 1998); and one in the Second Circuit, *E. R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co. et al.*, Nos. 97-94 68 (L), 97-9470 (CON), 97-9472 (CON), 97-9474 (CON), 97-9476 (CON), 97-9484 (XAT) (Docketed November 10, 1997) (August 10, 1998 before Calabresi, Jacobs and Straub, JJ.).

This circuit conflict is not only of interest to Underwriters. As noted above, this jurisdictional question is of interest nationally because of the frequent presence of Underwriters at Lloyd's in complex multi-state, long-tail claims involving mass torts and asbestos or pollution liability.[10] Whether a federal forum is available to hear such complex litigation is of importance not only to domestic insurers but to their American policyholders as well.

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[10] Obviously, Underwriters at Lloyd's are involved in other types of insurance litigation as well, including those involving marine and aviation policies. A search for "Underwriters at Lloyd's, London" in case titles obtained 581 hits in the Allfeds Westlaw® database. While some of those cases would be duplicative, this search indicates the breadth of the matter.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT BELOW DID NOT APPLY THE REAL PARTY TO THE CONTROVERSY TEST ARTICULATED BY THIS COURT IN THE NAVARRO CASE.

The Seventh Circuit's opinion reflects several misunderstandings concerning the nature of this suit and the structure and operation of Lloyd's Underwriters that may have led to the court's erroneous conclusion that jurisdiction did not exist.

The Seventh Circuit held that the Names were not party defendants. *Indiana Gas*, A-5. This was incorrect as Indiana Gas sued "Certain Underwriters at Lloyd's, London," and those defendants clearly identified themselves to the Seventh Circuit as such. *See id.* at A-3: "Underwriters at Lloyd's, London, defendants below, are natural persons and sole traders, subscribing to policies of insurance each for his or her own part and not one for the other." While the Names were members of various Syndicates, the Syndicates were not the defendants; rather, the defendants were Names sued as subscribers to the policy.

This misunderstanding led the Seventh Circuit to find that the Syndicates, and not the Names, were parties, and that because the Syndicates were not corporations, they were treated as unincorporated associations, which, in turn, led to the finding that, like the citizenship of every partner in a partnership, the citizenship of every Name controlled for purposes of diversity. *Id.* at A-6-7. In so doing, the court of appeals relied on this Court's opinion in *Carden.*[11]

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[11] A Syndicate is of course not a partnership. Each Name has several liability; in this sense, it is more like a corporation. Unlike a partnership, each Name does *not* have the authority to bind every other Name; only the Active

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Carden is inapplicable to this case because *Carden* dealt exclusively with the situation where an artificial entity, *i.e.* a limited partnership, was the defendant.

> The question presented today is not which of various parties before the Court should be considered for purposes of determining whether there is complete diversity of citizenship, a question that will generally be answered by application of the "real party to the controversy" test. There are not, as the dissent assumes, multiple respondents before the Court, but only one: the artificial entity called Arkoma Associates, a limited partnership.

Carden, 494 U.S. at 188, n.1.

The question presented in this case is which of various parties before the court should be considered for determining whether there is a complete diversity of citizenship. As noted in *Carden*, the question should be answered by application of the "real party to the controversy" test.

This Court in *Navarro* established that only the real party to a controversy is considered for diversity purposes. In the context of a business trust, the real party to a controversy is one who has powers to "hold, manage and dispose of assets of others." *Navarro*, 446 U.S. at 464.

(Cont'd)
Underwriter does. *See generally*, *Daly v. Lime Street Underwriting Agencies Ltd.*, [1987] 2 FTLR 277 (Q.B.); *John Hayter Underwriting Agency Ltd. v. R.B.H.S. Agencies*, [1977] 2 Lloyd's Rep. 105 (C.A. 1976). The Court of Appeals also held, incorrectly and without citation to authority, that the Names cannot be sued by the insured. *Indiana Gas*, A-9, A-94. London Market Insurers are aware of no such prohibition.

The Sixth Circuit recognized that the real party to the controversy test was to be applied to cases involving Underwriters. *Certain Interested Underwriters at Lloyd's, London v. Layne,* 26 F.3d 39, 42 (6th Cir. 1994). That court correctly framed the central issue as follows: "[W]hose citizenship controls: the agent-underwriters or the syndicate members?" *Id.*[12]

This Court in *Navarro* emphasized three pertinent points:

1. Citizenship for diversity purposes is determined by identifying the real and substantial parties to the controversy;

2. Federal courts must disregard nominal or formal parties; and

3. Artificial entities, other than corporations, remain mere collections of individuals, and when the persons composing such associations sue in their collective name, the individuals are the parties whose citizenship determines the diversity jurisdiction of a federal court.

Navarro, 446 U.S. at 460-61.

This Court also noted that,

> [t]here is a rough symmetry between the "real party in interest" standard of [Fed. R. Civ. P.] Rule17(a) and the rule that diversity jurisdiction depends upon the citizenship of real parties to the controversy. But

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[12] Underwriters do not agree with the rationale of *Layne* that the Names are undisclosed principals. However, they agree with the holding that the Active Underwriters are the real parties to the controversy. *Layne*, 26 F.3d at 43. *See above.*

> the two rules serve different purposes and need not produce identical outcomes in all cases.

Navarro, 446 U.S. at 460, n. 9.

In this case, the Syndicates were not sued; the Names were. While the Names may be parties in interest under Rule 17(a), only the Active Underwriters of the Syndicates are the real parties to the controversy.[13] Because of the extensive delegation of authority of the Names to the Active Underwriters, and their exclusive control over the accounts held for those Underwriters, the Active Underwriters are vested with the requisite control which *Navarro* identified with the Trustees as the real parties to the controversy. Funds are paid at the direction of the Active Underwriters. There is a fiduciary duty running from the Active Underwriters to the other Names. An Active Underwriter acts as the representative of each Name in his or her Syndicate in all affairs regarding underwriting and claims handling practices, has the authority to enter into contractual arrangements on behalf of each Name, and can direct the disposal of his or her assets. And, of course, the Active Underwriters *do* have a personal stake in the litigation, as they themselves are Names, and thus truly represent the interest of the other Names for whom they are fiduciaries. *See supra* note 2 and accompanying text on p.4.

Every court of appeals, including the Seventh Circuit, has entertained appeals involving Underwriters at Lloyd's without questioning jurisdiction over them.[14] Indeed, up until *Indiana*

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[13] A Syndicate, unlike the partnership in *Carden*, has no legal existence. *See, e.g., Roby v. Corp. of Lloyd's*, 796 F. Supp. 103, 111 (S.D.N.Y. 1992), *aff'd on other grounds*, 996 F.2d 1353 (2d Cir. 1993), *cert. den.*, 510 U.S. 945 (1993): "In sum: English law controls, and under English Law the syndicates have no legal existence."

[14] *Putnam Resources v. Pateman*, 958 F.2d 448 (1st Cir. 1992);

(Cont'd)

Gas, eleven courts of appeals simply assumed jurisdiction even after this Court's opinion in *Carden*. The sole exception was the Sixth Circuit in *Layne*, which considered the question and upheld jurisdiction.

Given the subscription nature of the London Insurance Market, and particularly that of Lloyd's, where Names delegate complete authority over their underwriting affairs to the Active Underwriters, those Active Underwriters are the real parties to the controversy. Thus, under *Navarro*, only their citizenship should be considered in determining jurisdiction. *Cf. Aetna Cas. & Surety Co. v. Iso-Tex Inc.*, 75 F.3d 216, 218 (5th Cir. 1996) (single subscribing insurer on multi-insurer policy was real and substantial party to controversy such that action could be maintained in its name alone). Moreover, as noted above, Active Underwriters are themselves Names and are liable on the policy; thus they have the requisite personal stake in the litigation under *Navarro*. This case therefore presents the

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Landoil-Resources Corp. v. Alexander & Alexander Servs., Inc., 918 F.2d 1039 (2d Cir. 1990); *Dresser Indus. Inc. v. Underwriters at Lloyd's of London*, 106 F.3d 494 (3d Cir. 1997) (holding that diversity existed even though aliens were both plaintiffs and defendants); *Mitcheson v. Harris*, 955 F.2d 235 (4th Cir. 1992); *Real Asset Mgmt., Inc. v. Lloyd's of London*, 61 F.3d 1223 (5th Cir. 1995); *Logan v. Lloyd's Underwriters*, 888 F.2d 1391 (6th Cir. 1989); *Certain Underwriters of Lloyd's and Companies v. General Accident Ins. Co. of America*, 909 F.2d 228 (7th Cir. 1990); *Underwriters at Lloyd's London v. Pike*, 977 F.2d 1278 (8th Cir 1992); *National Am. Ins. Co. v. Certain Underwriters at Lloyd's, London*, 93 F.3d 529 (9th Cir. 1996); *Clark v. Brien*, 59 F.3d 1082 (10th Cir. 1995), *cert. den.*, 516 U.S. 1084 (1996); *Golden Door Jewelry Creations, Inc. v. Lloyd's Underwriter's Non-Marine Ass'n*, 8 F.3d 760 (11th Cir. 1993); *Independent Retrochemical Corp. v. Aetna Cas. & Sur. Co.*, 944 F.2d 940 (D.C. Cir. 1991), *cert. den.*, 503 U.S. 1011 (1992). *See also Smith v. Lloyd's of London*, 568 F.2d 1115, 1116, n.3 (5th Cir. 1978) (wherein the court recognized diversity jurisdiction even though it understood Lloyd's to be "an exchange or a market where various individuals or groups bid on the right to insure a given risk").

Court with the opportunity of clarifying the *Navarro* requirements for a real party to the controversy, and of assuring that the protection of diversity jurisdiction is afforded to those parties who are clearly entitled to it.

III.

A.

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT BELOW FAILED TO PROPERLY CONSIDER THE ACTIVE UNDERWRITERS' REPRESENTATIVE STATUS.

In their petition for rehearing in the court below, LMI argued that, since the court of appeals had rejected LMI's contention and found that the Syndicates were unincorporated associations, the court should consider treating the action as one brought under Fed. R. Civ. P. 23.2.[15] The court had this power under 28 U.S.C. § 1653. *Curley v. Brignoli, Curley & Roberts Associates*, 915 F.2d 81, 88 (2d Cir. 1990), *cert. denied*, 499 U.S. 955 (1991) ("*Brignoli*"), *citing International Bhd. of Boilermakers v. Local Lodge D354*, 897 F.2d 1400, 1402 (7th Cir. 1990). Under long-standing authority, only the citizenship of the named representative of a class is considered in determining diversity jurisdiction. *Snyder v. Harris*, 394 U.S. 332, 340 (1969); *Cauble*; *see also Brignoli*, 915 F.2d at 87; 7A Wright, Miller & Kane, *Federal Practice & Procedure* § 1755 (2d ed. 1986).

The court below, after first remarking that LMI had forfeited this argument by not raising it in their jurisdictional memorandum, *Indiana Gas*, A-94, went on to consider the argument on its merits.[16]

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[15] For the text of Rule 23.2, *see supra* p. 2.

[16] It is difficult to see how the ground could be forfeited when it was raised for the first time by the court's decision. Indeed, to resolve such unforeseen holdings is one of the purposes of rehearing.

The court held that the class action provision of Fed. R. Civ. P. 23.2 could not be invoked. The panel majority[17] concluded that the Active Underwriters *were* representing the Names (indeed, had to represent them because the Names could not be sued under English law);[18] however, the court continued, the Active Underwriters could not be representative parties for purposes of the Rule and of determining jurisdiction (under *Cauble*) because they did not have claims of their own, and the citizenship of the parties they represented thus had to be considered. *Indiana Gas*, A-94-96.

This reasoning is plainly incorrect given the fact that the Active Underwriters are *themselves* Names and do have a stake in the litigation.

The panel's characterization of *Cauble* is equally unpersuasive. The Seventh Circuit stated that this Court:

> held in *Cauble* that if there is complete diversity between named class representatives and the adverse parties, the district court may adjudicate the right of other class members under its supplemental jurisdiction . . . *Cauble* deals with a situation in which the parties have independent claims which could be fully resolved if other persons similarly situated were unaffected by the case.

Indiana Gas, A-95.

If this analogy is correct, it is difficult to see what class action would ever be appropriate, and when the *Cauble* rule would ever apply under Rule 23.2. The mere fact of commonality would, at a minimum, implicate collateral estoppel concerns, thereby potentially affecting similarly situated persons and requiring that the citizenship of every class member be considered.[19]

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[17] Judge Evans, while voting to deny the petition, did not join in the opinion denying rehearing.

[18] This incorrect statement was made without any citation to authority. *See supra* note 11.

Since it is plain that the Active Underwriters will adequately and fairly protect the interests of their Names, the court of appeals erred in not permitting the Active Underwriters to represent the Names under Fed. R. Civ. P. 23.2 and in not determining diversity under *Cauble*.

B.

THE PETITION SHOULD BE GRANTED SO THIS COURT MAY CLARIFY THE STANDARD FOR USE OF FED. R. CIV. P. 23.2.

This Court did not reach the question of the applicability of Fed. R. Civ. P. 23.2 to unincorporated associations in *Navarro*, (even though that question was presented, *see* 446 U.S. at 459, n.6) because diversity jurisdiction was found to exist with respect to the business trusts at issue in that matter. If this Court were to agree with the Seventh Circuit that this case is governed by *Carden*, the important question of the scope and applicability of Rule 23.2 would be squarely presented.

The circuits are split as to whether, in view of the Advisory Committee's Note to Rule 23.2,[20] the Rule is available where state law permits unincorporated associations to sue and be sued as jural entities. *Compare Northbrook Excess and Surplus Ins. Co. v. Medical Malpractice Joint Underwriting Ass'n of Mass.*, 900 F.2d 476, 478-80 (lst Cir. 1990) (Rule 23.2 not available) with *Brignoli*, 915 F.2d at 87 (Rule 23.2 available).

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[19] Most courts hold that the only requirement imposed by Fed. R. Civ. P. 23.2 is fair and adequate representation, and that the other requirements of Rule 23 do not apply. *Brignoli*, 915 F.2d at 85. The question whether the amount in controversy requirement would be met was not considered by the court below.

[20] The Advisory Committee's Note of 1966 to Rule 23.2, in relevant part, states:

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The commentators agree that *Brignoli's* reading of Rule 23.2 is the better view. 5 James W. Moore, *et al.*, *Moore's Federal Practice* §§ 23.2.06-23.207 (3d ed. 1997); 7C Wright, Miller & Kane, *Federal Practice & Procedure* § 1861 (2d ed. 1986).

The Seventh Circuit rejected the application of Fed. R. Civ. P. 23.2 to Underwriters even though a district court within that circuit has applied the rule in analogous circumstances. *Hartford Accident & Indem. Co. v. Dresser Indus. Inc.*, 1994 U.S. Dist. LEXIS 1763 (N.D. Ill. Feb. 16, 1994).[21]

The case law in the Fifth Circuit is conflicting. In a decision involving a Texas Lloyd's insurance group,[22] the Fifth Circuit ruled

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> Although an action by or against representatives of the membership of an unincorporated association has often been viewed as a class action, the real or main purpose of this characterization has been to give "entity treatment" to the association when for formal reasons it cannot sue or be sued as a jural person under Rule 17(b) . . . . Rule 23.2 deals separately with these actions, referring where appropriate to Rule 23. (Citations omitted).

[21] The district court permitted the intervention of two insurers in an action on their own behalf and as representatives of a class consisting of members of Industrial Risk Insurers ("IRI"), a group of insurance companies which obligated themselves on a large risk policy to the extent of a fixed percentage equal to their participation in IRI. The arrangement was thus similar to a Lloyd's policy.

[22] *See* Edwin W. Patterson, *Essentials of Insurance Law* § 9 at 48-49 (2d ed. 1957). A Texas Lloyds insurance group is organized similarly to Lloyd's of London but has no connection with Lloyd's of London.

that an attorney-in-fact could not serve as representative under Fed. R. Civ. P. 23.2, and that diversity had to be determined by the citizenship of each underwriter. *Royal Ins. Co. of America v. Quinn-L Capital Corp.*, 3 F.3d 877, 882-83 (5th Cir. 1993), *cert. den.*, 511 U.S. 1032 (1994); *see also Massey v. State Farm Lloyds Ins. Co.*, 993 F. Supp. 568, 570 (S.D. Tex. 1998) (following *Quinn-L*).

Another panel of the Fifth Circuit held differently in a situation almost identical to *Quinn-L. Aetna Cas. & Surety Co. v. Iso-Tex. Inc.*, 75 F.3d 216 (5th Cir. 1996).

This Court should take the opportunity to clarify the scope and applicability of Rule 23.2.

CONCLUSION

This case presents the Court with a unique opportunity to clarify the application of the "real party to the controversy" test of *Navarro* — a test that is vital to the proper administration of diversity jurisdiction — and, if the circuit conflict on the question is resolved in favor of the court below, to define the proper use of representative parties under Fed. R. Civ. P. 23.2.

If the opinion below is allowed to stand, a federal forum will be foreclosed to many complex insurance disputes among persons of diverse citizenship. This would constitute an improper restriction on the exercise of diversity jurisdiction, and would be especially egregious to Underwriters, the majority of whom are foreign nationals.

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN *INDIANA GAS COMPANY, INC., et al. v. HOME INSURANCE COMPANY, et al.* DECIDED APRIL 6, 1998

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 97-1328 & 97-1381

INDIANA GAS COMPANY, INC., *et al.*,

Plaintiffs-Appellants,

v.

HOME INSURANCE COMPANY, *et al.*,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Indiana, Fort Wayne Division.
No. 1:95cv101 — William C. Lee, Chief Judge.

ARGUED JANUARY 6, 1998 — DECIDED APRIL 6, 1998

Before POSNER, *Chief Judge*, and EASTERBROOK and EVANS, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Long ago, predecessors to Indiana Gas Company manufactured gas by heating coal and oil at nine sites in Indiana. The principal residual was coal tar, a sludge containing pitch plus pyridine and additional organic compounds that are raw materials for the production of paints, dyes, plastics, pharmaceuticals, and other synthetic products. Some coal tar was discarded before these beneficial uses were discovered, additional by-products of gas manufacturing were not suitable feedstocks for other industries, and at all events production often exceeded the demand. What could not be sold or given away was placed in containment structures of various kinds, from which it has begun to leak. At two sites (and perhaps others) residuals were placed in holder pits and used as fill to level off the ground. Coal tar has some dangerous constituents, so Indiana Gas faces cleanup costs, for which it sought indemnity from its insurers. When the insurers refused, Indiana Gas and affiliated companies (collectively "Indiana Gas") initiated this comprehensive action against many of the firms that issued policies over the course of the last century, seeking a declaratory judgment that would require them to cover the cleanup costs and liability to third parties that Indiana Gas foresees. In order to resolve the suit the district court addressed many issues, such as whether the coal tar's escape was inevitable or may be characterized as an "accident" covered by the policies, and if so whether the pollution exclusions in many of the policies negate indemnity. After 11 published opinions terminated most claims in defendants' favor, 946 F. Supp. 627-39; 951 F. Supp. 759-820, settlements were reached on the rest, and Indiana Gas has appealed.

Searching for a comprehensive solution to insurance-coverage questions creates a potential problem when jurisdiction depends on 28 U.S.C. § 1332 (in this case, § 1332(a)(3)). The more defendants, the more likely it is that one of them will have the same citizenship as one of the plaintiffs, spoiling the "complete diversity" that under *Strawbridge v. Curtiss,* 7 U.S. (3 Cranch) 267 (1806), is essential. Plaintiffs are incorporated and have their principal places of business in Indiana, so the suit is untenable if any defendant must be treated as a citizen of Indiana. The complaint named among the defendants "Certain Underwriters at Lloyd's, London" and "Certain London Market Insurance Companies." Which underwriters and companies are the "certain" underwriters and companies? What kinds of entities are they, and what rules govern ascertainment of their citizenships? The complaint does not say, and the district judge did not require Indiana Gas to be more specific. The London Market Insurers inform us that all but five of the "companies" are corporations organized under the law of the United Kingdom, with principal places of business there, and that none of the five domestic corporations is incorporated or has a principal place of business in Indiana. But what is the citizenship of the "underwriters"? A syndicate that underwrites insurance through the exchange at Lloyd's can have hundreds of members (known as "names"), located throughout the world, and any given policy is underwritten by multiple syndicates. Indiana Gas's brief asserts: "Defendants Certain Underwriters at Lloyd's, London and Certain London Market Insurers ("London") are various corporations and syndicates, none of which is incorporated or maintains its principal place of business in Indiana." This treats each syndicate as an entity with a single citizenship taken from its principal place of business. The London Market Insurers' brief, by contrast, treats the syndicates as unincorporated associations: "Underwriters at Lloyd's, London, defendants below, are natural persons and sole traders, subscribing to policies of insurance each for his or her own part and not one for the other. They are members of various syndicates which are located in and have their principal place of business in London, England." On this view the right parties are not the syndicates but either (a) the persons who subscribed to the policies on behalf of the syndicates, or (b) all of the names.

Every name in a syndicate faces unlimited personal liability, like a partner in a general partnership. Syndicates are run, however, much like limited partnerships, with a lead member (the "active underwriter" or "managing agent") able to transact business without consulting the investors. Descriptions of the London insurance market and the organization of underwriting syndicates at Lloyd's may be found in *Daly v. Lime Street Underwriting Agencies Ltd.*, [1987] 2 FTLR 277 (Q.B.); *John Hayter Underwriting Agency Ltd. v. R.B.H.S. Agencies*, [1977] 2 Lloyd's Rep. 105 (C.A. 1976); and *Edinburgh Assurance Co. v. R.L. Burns Corp.*, 479 F. Supp. 138, 145-46 (C.D. Cal. 1979), affirmed (with an immaterial exception), 669 F.2d 1259 (9th Cir. 1982).

Corporate citizenship is specified by 28 U.S.C. § 1332 (c)(1): a corporation is deemed a citizen of the jurisdiction where it is incorporated, plus the jurisdiction in which it has its principal place of business. Unincorporated business entities, however, are treated as citizens of every jurisdiction in which any equity investor or member is a citizen. Thus both general and limited partnerships are citizens of every jurisdiction of which any partner is a citizen. *Carden v. Arkoma Associates*, 494 U.S. 185 (1990); *Guaranty National Title Co. v. J.E.G. Associates*, 101 F.3d 57 (7th Cir. 1996). Membership associations such as labor unions, joint stock companies, and joint ventures take the citizenship of each member. *Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145 (1965); *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449 (1900). Underwriting syndicates are not corporations, and, because a court has a duty to ensure that subject-matter jurisdiction is present even if the parties disregard the issue, we inquired at oral argument whether, when this case began (the only relevant time, see *Denlinger v. Brennan*, 87 F.3d 214 (7th Cir. 1996)), any of the names in any of the syndicates was a citizen of Indiana. None of the lawyers knew, so we directed Indiana Gas and the London Market Insurers to supplement the record with the necessary information. We also extended to Indiana Gas the option of dismissing the London syndicates in order to ensure complete diversity and permit final resolution of its claims against its other insurers, see *Newman-Green, Inc. v. Alfonzo-Larrain,* 490 U.S. 826 (1989), and offered all parties an opportunity to address the legal significance of the names' citizenship.

All parties other than Indiana Gas and the London Market Insurers have passed on the opportunity to discuss the jurisdictional consequences of the names' citizenship, although the issue imperils the judgment with respect to every party. After a search of their records, the London Market Insurers inform us that "there is at least one subscribing name who was domiciled in Indiana as of the date of the filing of the Complaint." For its part, Indiana Gas has volunteered to dismiss any names who were citizens of Indiana when the complaint was filed. This offer is pointless, for the names are not parties to begin with and therefore cannot be dismissed. Either the active underwriters or the syndicates are the right parties; no view of the situation makes the names parties in their own right. It may be that the active underwriters or syndicates have multiple citizenships, but this does not imply that there are multiple parties. See *Carden,* 494 U.S. at 190 n.2. Indiana Gas can no more dismiss individual names than it could sue a partnership and "dismiss" any partners who are citizens of Indiana. A syndicate is in or out as a unit. Indiana Gas had a chance under *Newman-Green* to dismiss the London underwriting syndicates, so that it could proceed against the other insurers. It elected not to do so. As a result, we must decide whether the citizenship of the underwriters is the citizenship of every name, or only of the active underwriter who acts as the managing agent.

An underwriting syndicate at Lloyd's has the personal-liability characteristics of a general partnership and the management structure of a limited partnership. It is not incorporated and does not have the structure of a trust — to quote again from the London Market Insurers' brief, the names "are natural persons and sole traders, subscribing to policies of insurance *each for his or her own part* and not one for the other. They are *members* of various syndicates" (emphasis added). General partnerships, limited partnerships, joint stock companies, and unincorporated membership associations all are treated as citizens of every state of which any partner or member is a citizen. See *Carden* (general and limited partnerships); *Bouligny* (unincorporated associations); *Chapman v. Barney*, 129 U.S. 677 (1889) (joint stock company). It follows that the underwriting syndicates have the citizenships of every name. (They could have other citizenships as well. Section 1332(c)(1) creates a special rule for insurers in "direct actions" — that is, cases in which a person with a claim against the insured sues the insurer directly. In direct actions insurers have not only their normal citizenship(s), but also the citizenship(s) of the insured. But as this is not a direct action, this aspect of §1332(c)(1) does not matter.)

Both Indiana Gas and the London Market Insurers observe that English law permits the active underwriters to sue and be sued as representatives of the names, but the fact that the names are not parties does not distinguish the syndicates from partnerships, which (depending on the jurisdiction) are sued either in their own names or in the names of selected partners. Likewise the fact that the underwriting syndicates are unusual organizations, with some properties of general partnerships, some of limited partnerships, some of joint stock companies, and some of trusts (on which more below) does not affect the jurisdictional inquiry. *Carden* articulated a general rule: *every* association of a common-law jurisdiction other than a corporation is to be treated like a partnership. The reference to "common-law jurisdiction" in the preceding sentence acknowledges the holding of *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933), that the civil-law entity known as a *sociedad en comandita* is to be treated like a corporation. *Carden* tells us that this holding is not to be extended:

> *Bouligny*[,] . . . in reaffirming "the doctrinal wall of *Chapman v. Barney*," . . . explained *Russell* as a case resolving the distinctive problem "of fitting an exotic creation of the civil law . . . into a federal scheme which knew it not." 382 U.S., at 151. There could be no doubt, after *Bouligny*, that at least common-law entities (and likely all entities beyond the Puerto Rican *sociedad en comandita*) would be treated for purposes of the diversity statute pursuant to what *Russell* called "the tradition of the common law," which is "to treat as legal persons only incorporated groups and to assimilate all others to partnerships." 288 U.S., at 480.

494 U.S. at 190 (footnote omitted). This approach reflects a strong reluctance to extend the diversity jurisdiction by judicial interpretation — a reluctance that has characterized the Supreme Court's jurisprudence ever since *Strawbridge* held that complete diversity is essential. Congress may choose to establish special rules for some kinds of associations, as it has done in §1332(c) for corporations, decedents' estates, and insurers named as defendants in direct actions, but when the statute is silent we apply the norm that all unincorporated associations are treated as partnerships.

This sets up the London Market Insurers' principal position: that the syndicates are not juridical entities — they can't sue or be sued — and therefore are not "associations" at all. They must be treated like trusts, the argument goes, because the active underwriters serve the function of trustees protecting the interests of the other names and litigating on their behalf. Trusts take the citizenship of the trustees rather than of the beneficiaries. *Navarro Savings Association v. Lee*, 446 U.S. 458 (1980). One difficulty with the London Market Insurers' position is that English law denies that the syndicates are trusts, or the active underwriters trustees. *Boobyer v. Holman Co.*, [1993] 1 Lloyd's Rep. 96 (Q.B. 1992). *Navarro* dealt with an "express trust" (446 U.S. at 462); whatever the syndicates may be, they are not express trusts. A second problem is that the agreements between the names and the active underwriters treat the active underwriters as agents. A typical contract delegates authority to

> appoint or employ any person firm or body corporate to carry on or manage the underwriting or any part of it and may delegate to or confer upon any such person firm or body corporate all or any of the powers authorities discretion rights and duties given to the Agent by [the names' agency agreement].

Trustees, by contrast, are principals, owning and managing a defined pool of assets. And this gets to the third difference. Trustees own the corpus; ownership is what distinguishes a trustee from an agent. Active underwriters commit the wealth of the syndicates' names to fulfilment of the policy, which makes the insurance valuable to the customer, but the active underwriters do not own this wealth or exercise over it any dominion other than the power to underwrite risks. The difference between management of the names' assets and ownership of a corpus has a jurisdictional consequence. *Navarro* qualified its discussion as one dealing with "trustees whose control over the assets *held in their names* is real and substantial." 446 U.S. at 465 (emphasis added). Otherwise any unincorporated association could avoid Strawbridge by naming an agent or attorney to act on behalf of all members. Consider the arrangement in *Northern Trust Co. v. Bunge Corp.*, 899 F.2d 591 (7th Cir. 1990): Shareholders in a closely held corporation appointed the trust department of a bank as their agent to negotiate the sale of their interests. When a question later arose about a warranty in the acquisition, the bank brought suit as agent for all of the selling stockholders. We held that the citizenship of the bank, as agent, was the citizenship of each investor. 899 F.2d at 594-96. The bank did not own the stock and therefore was not a trustee, we concluded; and if it was not a trustee then it was an agent for an unincorporated association, to which the approach of *Bouligny* was applicable. English law treats the active underwriters as agents for the names in much the way the bank was agent for the investors. If the bank was not acting as a trustee, the active underwriters also are not trustees.

Certain Interested Underwriters at Lloyd's v. Layne, 26 F.3d 39 (6th Cir. 1994), treats the active underwriters as agents for the names, which the court considered to be "undisclosed principals." Applying the "venerable common law rule that an agent for an undisclosed principal is personally liable on a contract" (26 F.3d at 43), *Layne* concludes that the citizenship of the names is irrelevant. This supposes that the names are not liable if they are not sued, and that if they aren't exposed to loss their citizenship doesn't count. This is problematic under American law— limited partners can't be sued for the partnership's acts and are not exposed to damages beyond loss of their investments, yet their citizenship counts. What is more, the intersection of English law with the sixth circuit's rationale produces an unfortunate implication. Recall that under English law the names *cannot* be sued by insureds. If inability to sue them personally means that their interests are not affected by the litigation, it would follow that no insured could rely on their promises or use their wealth to support the insurance agreement. No surprise therefore that the London Market Insurers embrace the result of *Layne* but not its rationale, which would make policies written on the London market less valuable to insureds. Yet the syndicates need not fear that *Layne*'s rationale will wipe out their business, for *Layne* is mistaken. The proposition that an agent for an undisclosed principal is liable does not imply that the undisclosed principal is *not* bound by the contract; the full statement of the "venerable rule" is that both agent and principal are bound. See *Restatement (2d) of Agency* §§ 186, 302. When the principal's interests are affected by the litigation, the principal's citizenship counts even if the agent is the sole litigant. So we held in *Northern Trust*, a case the sixth circuit did not mention.

Layne is the only appellate opinion that has discussed syndicates' citizenship under §1332. District courts are split. Some analogize the active underwriters to trustees, while others think that the syndicates should be treated as partnerships. Many courts of appeals, including this one, see *Certain Underwriters of Lloyd's v. General Accident Insurance Co.*, 909 F.2d 228 (7th Cir. 1990), have resolved litigation by or against London syndicates under §1332, but none discusses the potential significance of the names' citizenship, and therefore none expresses a holding on the subject. *Pennhurst State School Hospital v. Halderman*, 465 U.S. 89, 119 & n.29 (1984); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 & n.9 (1952); *R.R. Donnelley Sons Co. v. FTC*, 931 F.2d 430, 433 (7th Cir. 1991). See also *Webster v. Fall*, 266 U.S. 507, 511 (1925). For all we can tell, in cases such as *General Accident* none of the names in the syndicates that underwrote the policy had the same citizenship as an insured, so the question could not have arisen. *Dresser Industries, Inc. v. Underwriters at Lloyd's of London*, 106 F.3d 494 (3d Cir. 1997), on which Indiana Gas relies, likewise does not address the subject. *Dresser* holds only that jurisdiction is not spoiled by the presence of an alien on both sides of the case, if the parties are otherwise of diverse citizenship. Accord, *Allendale Mutual Insurance Co. v. Bull Data Systems, Inc.*, 10 F.3d 425, 427-28 (7th Cir. 1993). The third circuit did not discuss the role of the names' citizenship. On that subject *Layne* stands alone among appellate decisions —and we conclude that it stands incorrectly. We disagree with *Layne* and hold that the underwriting syndicates must be treated like partnerships when determining their citizenships.[†]

Citizens of Indiana are on both sides of this case, which therefore may not be maintained under §1332. The judgment of the district court is vacated, and the case is remanded with instructions to dismiss for want of subject-matter jurisdiction.

[†] Because this conclusion creates a conflict among the circuits, this opinion was circulated before release to all judges in active service. See Circuit Rule 40(e). A majority did not favor a hearing by the full court. Circuit Judges Kanne and Evans voted for rehearing en banc.

EVANS, *Circuit Judge*, dissenting. Good lawyers — and Mark Levy, the attorney for the Indiana Gas Company, is certainly nothing if not a mighty good lawyer[1] — often spend the evening before an appellate oral argument trying to anticipate the sort of questions they may be asked by the judges the next morning. This case undoubtedly got Levy thinking about esoteric things like the fine points of hydrology and mundane things like pollution exclusions in insurance policies.

But surprise surprise. Forty-five seconds into Mr. Levy's argument, a question arrived from deep in the left field corner: "How do we know there is subject matter jurisdiction in this case?" Today the court answers its own question: There is no federal jurisdiction. So, despite the fact that the complaint alleged an arguable basis for diversity jurisdiction, the answers conceded jurisdiction, the district judge nurtured the case for three years and the parties came here looking for answers to questions on the merits of this complex litigation, we tell everyone they wasted their time. The district court, we hold, didn't have jurisdiction from the get-go, so close the hymnals because mass is over. Go home. Case dismissed. Three years of work in the district court getting the case to this point are washed down the drain. Because this result is unacceptable, I dissent.

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[1] Mr. Levy, a former Deputy Assistant Attorney General for appellate matters in the Civil Division of the Justice Department and presently a partner at Washington, D.C.'s Howrey & Simon, is one of the country's premier appellate litigators. See *The National Law Journal*, July 31, 1995. But by highlighting Mr. Levy, I don't mean to slight the other attorneys who argued this case before our panel. Harry Lee, Stephen Roberts, and Sonia Waisman, from powerhouse law firms (Steptoe & Johnson LLP, Washington, D.C.; Mendes & Mount, LLP, New York, New York; and Luce, Forward, Hamilton & Scripps, LLP, San Diego, California, respectively) all appear to be top-notch lawyers. And obviously the district judge, William Lee (Yale University, B.A., 1959; University of Chicago Law, J.D., 1962), a grizzled veteran of 17 years on the district court bench, is no slouch as well.

The majority correctly notes that we have "a duty to ensure that subject-matter jurisdiction is present even if the parties disregard the issue. . . ." Slip op. at p. 4. But having a *duty* and going so far beyond its call are not the same thing.

In establishing the requirement of "complete diversity" and finding it lacking 190 years ago in *Strawbridge v. Curtiss,* 7 U.S. (3 Cranch) 267 (1806), Chief Justice Marshall did no more than look at the complaint which showed Massachusetts plaintiffs suing Massachusetts defendants plus someone (Curtiss) from Vermont. Today, in finding "complete diversity" to be absent, our court goes through a very elaborate academic exercise. First it pooh-poohs the unchallenged allegation in the complaint that none of the various entities (Certain Underwriters at Lloyd's, London and Certain London Market Insurers) are, for diversity purposes, from Indiana. Next, it pays no heed to the fact that many federal courts, including ours in *Certain Underwriters of Lloyd's v. General Accident Insurance Co.*, 909 F.2d 228 (7th Cir. 1990) (Bauer, J.), have resolved litigation on the merits in similar diversity cases against London syndicates. Finally, the court goes out of its way to distinguish *Certain Interested Underwriters at Lloyd's v. Layne,* 26 F.3d 39 (6th Cir. 1994) — where a jurisdictional objection was raised and rejected — while on its way to creating a conflict among the circuits.

I prefer to do none of these things. I would follow, at this time, the holding of *Layne* and resolve this dispute on the merits. To do otherwise makes the professionals in this case — a bevy of top-notch lawyers and an experienced and able district judge — look, unfairly, as if they were slipshod in discharging their responsibilities for failing to note that for over a thousand days this case had no business being in a federal court.

A true Copy.

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — DECISIONS OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, FORT WAYNE DIVISION IN *INDIANA GAS COMPANY, INC. et al. v. AETNA CASUALTY & SURETY COMPANY, et al.* DATED OCTOBER 2, 1996

INDIANA GAS COMPANY, INC., Richmond Gas Corporation d/b/a Indiana Gas Company, Inc. and Terre Haute Gas Corporation d/b/a Indiana Gas Company, Inc., Plaintiffs,

v.

AETNA CASUALTY & SURETY COMPANY, Connie Lee Insurance Company, Continental Casualty Company, Continental Insurance Company, Greenwich Insurance Company, Home Insurance Company, Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies, North River Insurance Company, Ranger Insurance Company, St. Paul Fire & Marine Insurance Company, St. Paul Surplus Lines Insurance Company, and the Travelers Company, Defendants.

No. 1:95-CV-101.

United States District Court,
N.D. Indiana,
Fort Wayne Division.

Oct. 2, 1996.

* * *

Appendix B

MEMORANDUM OF DECISION AND ORDER

WILLIAM C. LEE, District Judge.

This matter is before the Court on the "Motion to Dismiss Plaintiff's Claims for Declaratory Judgment as to the Richmond Site for Lack of Jurisdiction" filed July 10, 1996, by defendants St. Paul Fire & Marine Insurance Company, St. Paul Surplus Lines Insurance Company, Ranger Insurance Company, those London Market insurers severally subscribing to policies of excess insurance in favor or Richmond Gas Corporation, and Home Insurance Company. The thrust of that motion is that there is no case or controversy with respect to claims relating to the Richmond site. That same date, defendants Aetna Casualty & Surety Company, the London Market Insurers and the Home Insurance Company joined in that motion to dismiss contending that the same arguments applied with respect to the manufactured gas plants at Bedford, Greencastle, Huntington, Marion, Seymour and Terre Haute. Plaintiffs responded to the motion to dismiss for lack of jurisdiction on July 10, 1996 to which a reply was filed on August 9, 1996. For the following reasons, the motion to dismiss will be granted.

Factual Background

For present purposes, the relevant facts, construed in plaintiffs' favor, may be summarized briefly as follows: This litigation has as its origin a federal lawsuit that was filed by Indiana Cities Water Corporation. In that case, an amended complaint was filed to add Indiana Gas and PSI Energy, Inc. The amended complaint alleged contamination and the threat of contamination in the shallow and deep aquifers at the point of raw water collection at a site in Shelbyville, Indiana. Indiana Gas was then joined as a party by the

Indiana Department of Environmental Management (IDEM) in an enforcement action relating to the Shelbyville site. Purportedly Indiana Gas timely notified its insurers (some of the defendant insurers in this action) but those insurers failed and refused to indemnify Indiana Gas.

A separate enforcement action was instituted against Indiana Gas by IDEM, this time relating to groundwater contamination at a former manufactured gas plant (MPG) at Lafayette. Indiana Gas defended the enforcement action and conducted remedial activities in compliance with orders issued by IDEM. Once again, after notifying the insurers, the insurers refused to defend the action or indemnify Indiana Gas in accordance with their policies.

Subsequent to those actions, Indiana Gas conducted a preliminary assessment/site investigation at former MGP sites in Marion, Bedford, Greencastle, Huntington, Seymour, Terre Haute and Richmond. Those investigations were completed in March of 1995 revealing contamination at each of the seven sites.[1] At least with respect to the Richmond, Terre Haute, Bedford and Greencastle sites, the level of contamination exceeds regulatory standards which could require further response or remediation. In November of 1992, Indiana Gas notified St. Paul, Aetna, Home and the London Market Insurers of the potential loss at the Marion, Bedford, Greencastle, Huntington, Seymour, Terre Haute and Richmond former MGP sites. In that correspondence, Indiana Gas requested that the defendants agree to reimburse Indiana Gas for all costs incurred in connection with the investigation of the MGP sites together with the cost of any remediation of any potential property damage pertaining to the sites. The insurers refused to acknowledge their coverage for these potential costs.

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[1] It would appear that defendants' own expert agreed that those sites were in fact contaminated.

Plaintiffs filed suit in this Court on April 14, 1995. Count I alleges that "[d]efendants have failed to honor their contractual obligation: to (1) defend Indiana Gas; (2) pay in full the defense costs and expenses of Indiana Gas; and/or (3) indemnify Indiana Gas for damages and/or expenses and/or its losses and obligations with respect to the claims alleged . . ." (complaint ¶¶ 95 & 98) in the Shelbyville and Lafayette actions.[2] In Count 2, plaintiffs seek a declaratory judgment that the insurers have failed in their duty to defend and indemnify with respect to not only the Shelbyville and Lafayette sites but also the Bedford, Greencastle, Richmond, Huntington, Marion, Seymour, and Terre Haute sites.

At the time of the filing of the complaint, no third party (including the IDEM or the Environmental Protection Agency (EPA)) had made any claim, issued any order, or filed any action against Indiana Gas regarding the Bedford, Greencastle, Huntington, Marion, Seymour, Terre Haute or Richmond MGPs. Nor had any claim or administrative orders been threatened regarding any of these seven sites.

Application of Law

As indicated at the outset, St. Paul and others have filed a motion to dismiss the declaratory judgment claim as it relates to the Richmond site because this Court lacks subject matter jurisdiction. In its joinder of that motion, Aetna and others contend the same with respect to the Bedford, Greencastle, Huntington, Marion, Seymour and Terre Haute sites. Because this court is of the view that there is no case or controversy with respect to those sites, the motion to dismiss will be granted.

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[2] Indiana Gas alleges in the complaint that it has spent in excess of three million dollars relating to the remedial activities at the Lafayette site and in excess of two million dollars on the Shelbyville site.

" 'The judicial power does not extend to abstract questions.' " Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 242, 73 S.Ct. 236, 239, 97 L.Ed. 291 (1952) (quoting Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 324, 56 S.Ct. 466, 472, 80 L.Ed. 688 (1936)). Rather, federal courts can only resolve actual "cases" and "controversies." U.S. Const. art. III, § 2. The existence of a case or controversy is a prerequisite to all federal actions, including those for injunctive and declaratory relief. Skelly Oil Co. v. Phillips Petroleum, 339 U.S. 667, 671-72, 70 S.Ct. 876, 878-79, 94 L.Ed. 1194 (1950). Consonant with Article III, the Declaratory Judgment Act provides that "[i]n a case of actual controversy within its jurisdiction . . . any Court in the United States, upon the filing of an appropriate pleading may declare the rights and other legal relations of any interested party seeking such a declaration." 28 U.S.C. § 2201(a).

"[A] justiciable controversy is . . . distinguished from a difference or dispute of a hypothetical or abstract character; [or] from one that is academic or moot." Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41, 57 S.Ct. 461, 464, 81 L.Ed. 617 (1937). "The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests." Id. To determine whether there is a "controversy," the court must "look to the state of affairs as of the filing of the complaint; a justiciable controversy must have existed at that time." International Harvester v. Deere & Co., 623 F.2d 1207, 1210 (7th Cir.1980).

"At first blush, the existence vel non of an actual controversy would not appear to lend itself to discretionary disposition. Either there is an actual controversy or there is not." Certain Underwriters at Lloyd's v. St. Joe Minerals Corp., 90 F.3d 671, 675 (2nd Cir.1996). " 'The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy.' " Id. (quoting, Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941)).

The notion that the difference between an abstract question and a controversy is one of degree, and that it is not possible to fashion a precise test distinguishing between the two, can be seen in cases such as this where an insured seeks a declaratory judgment against its insurer relating to remedial actions or clean up costs at a contaminated site. In the present matter, defendants, relying primarily upon the United States Court of Appeals for the Eleventh Circuit's decision in Atlanta Gas & Light v. Aetna, 68 F.3d 409 (11th Cir.1995) and the Eighth Circuit's decision in Gopher Oil Company v. Bunker, 84 F.3d 1047 (8th Cir.1996) contend that this case is not justiciable. The plaintiffs, on the other hand, place heavy reliance on the United States Court of Appeals for the Third Circuit's decision in Riehl v. Travelers Insurance Co., 772 F.2d 19 (3rd 1985) and the Eighth Circuit's opinion in Aetna Casualty and Surety Co. v. General Dynamics Corp., 968 F.2d 707 (8th Cir.1992) for the opposite proposition. Those decisions, which appear to arrive at seemingly divergent results, however, are reconcilable when the facts presented are closely examined. Moreover, when the facts presented here are compared with those in the above-cited decisions, it is clear that this case is more akin to Atlanta Gas and Gopher Oil than it is to Riehl and General Dynamics.

In Atlanta Gas, the insured brought an action for declaratory judgment asking the court to determine that the insurer had a duty to defend and indemnify it for cleanup costs at its manufactured gas plants. On appeal, the United States Court of Appeals for the

Eleventh Circuit determined, sua sponte, that there was no justiciable controversy writing:

> The district court made no determination that a justiciable controversy existed when the complaint was filed; the record would not support such a finding. Not only had the insurers not yet received the notice, no one knew exactly what had to be cleaned up, or how much the cleanup would cost. While it is not necessary to know each of these factors with certainty in order to seek declaratory relief, when AGL filed its complaint, it was not clear that state and federal environmental agencies would ever require cleanups at any of AGL's former MPG sites. The record demonstrates that the regulatory climate was evolving when AGL filed its suit: what actions would be required by regulators was uncertain. At the time the complaint was filed, GEPD had concluded that AGL's Georgia site posed no threat to public health, and FDER had recommended only 'additional site screening' at the Sanford, Florida site. No then-owner of an MGP site had called upon AGL to reimburse them for cleanup costs or to clean up wastes itself. No lawsuits had been filed against AGL, either by owners of former MGP sites or by adjacent property owners. With so many material facts dependent upon future contingencies, it would be impossible to resolve all the issues relative to the timeliness of notice in a way that would do justice to the parties.

Id. 68 F.3d at 415. Similarly, in Gopher Oil, the United States Court of Appeals for the Eighth Circuit upheld the dismissal of claims seeking declaratory judgment of potential liabilities of two parties with respect to environmental cleanup costs at a site since there were "[n]o facts [to] indicate an immediate threat of either MERLA [Minnesota Environmental Response & Liability Act] or tort liability." Id. 84 F.3d at 1051. Thus, in both Atlanta Gas and Gopher Oil, there was no controversy within the meaning of Article III.

Conversely, a justiciable controversy relating to the costs of cleaning up contaminated sites was found to exist in both Riehl and General Dynamics. In Riehl, an insured brought an action seeking a declaration that certain insurance policies covered expenses of cleaning up a toxic dump site. Although the insured had received notice from the EPA that he was a responsible party under the Comprehensive Environmental Response Compensation Liability Act (CERCLA) and as such would be assessed the expense of cleaning up the site, as of the time of filing of suit no legal proceedings had been instituted against him by either the Pennsylvania Department of Environmental Resources or the EPA. In holding that the matter was justiciable, the United States Court of Appeals for the Third Circuit wrote:

> In order for a case to be justiciable, the salient facts must be real, not hypothetical. Our review of justiciability is plenary. The problem of justiciability is especially troublesome in a declaratory judgment action, where the court may be asked to decide a case based on events that have not yet and may not occur. . . . Where, however, the essential facts establishing a right to relief, including declaratory relief, have already occurred, the case is justiciable. . . .
>
> From the summary judgment record before us, it appears that all relevant events have already occurred, and the case thus appears justiciable. The dumping of the wastes and the leaching off the property of these chemicals have apparently already transpired. . . .

> The only events which have yet to occur are the expenditures of the funds by Riehl for clean-up and the entry of judgment imposing liability on Riehl for the toxic waste damage. However, neither immediate liability for damages, nor a liquidation to the extent of an insurer's indemnification obligation is necessary in this Circuit to establish a justiciable controversy. In ACandS v. Aetna Casualty & Surety Co., 666 F.2d 819 (3rd Cir.1981), this court found justiciable the question of liability insurance coverage for exposure to asbestos even though not all of the carriers against whom declaratory relief was sought were as yet implicated by an actual suit against the insured.
>
> Since all relevant events appear from the record to have occurred, we hold that this case is ripe for adjudication.

Id. 772 F.2d at 22-23 (footnote omitted). Similarly, in General Dynamics Corp., an insurer brought an action against its insured seeking declaratory relief as to its obligation to defend and indemnify the insured in connection with claims involving environmental pollution. At issue were sixteen sites, however, the district court held that with respect to four of those sites the case was not ripe since no suit had been filed nor any settlement achieved at the four sites. In reversing that aspect of the district court's decision, the United States Court of Appeals for the Eighth Circuit wrote:

> Aetna also contends that the district court erred by holding that because no suits had yet been filed nor any settlements reached with respect to four of the sixteen sites, Aetna's declaratory judgment action was not ripe for adjudication as to those sites.

> Aetna argues that since General Dynamics had made a clear demand for payment of defense and indemnity costs with respect to each of the four sites and because Aetna disputed those demands, there is a live justiciable controversy between the parties sufficient to invoke the jurisdiction of the district court. . . . General Dynamics does not address this issue on appeal; apparently it concedes that the district court's decision was in error. We agree with Aetna that a live justiciable controversy exists between the parties and hold that Aetna's suit is ripe with respect to the four sites.

Id., 968 F.2d at 711 (citation omitted).

In the present matter, this case is similar to both Atlanta Gas[3] and Gopher Oil in that at the time the suit was filed no third party had made any claim or filed any litigation regarding the sites in issue; neither the state environmental agency nor the EPA had issued any notice or order or threatened any claim regarding those sites; and it is not clear whether either the state or federal government would ever require a clean-up since no notices, orders, claims, litigation or directives have been issued regarding the sites. Those factual similarities between Atlanta Gas and Gopher Oil also make this case dissimilar from the decisions in Riehl and General Dynamics because in Riehl plaintiff had "received notice that the EPA would commence clean-up of the site, and that all expenses of clean-up would be assessed against Riehl as a 'responsible party' under the comprehensive Environmental Response Compensation Liability Act of 1980 ('CERCLA'), 42 U.S.C. § 9607(a),"[4] 772 F.2d at 21, and in General Dynamics, of the sixteen sites at issue, the insured had been "served with lawsuits concerning environmental contamination at seven sites and with letters from federal and state environmental protection agencies or from private parties demanding that it clean up environmental wastes at nine other sites." 968 F.2d at 709. Here, no such lawsuits have been filed nor have demands been made that the Richmond, Bedford, Greencastle, Huntington, Marion, Seymour and Terre Haute sites be clean up or remediated. As such, there is no controversy with respect to those sites and accordingly no justiciable issue is presented to the Court.

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[3] Indeed save for the fact that the plaintiff in Atlanta Gas failed to give notice to its insurer until at the time of filing suit, this case is virtually identical to Atlanta Gas. While this failure to give notice was a factor in the court's determination that the case was not justiciable, it was but one factor. Most tellingly, however, was the fact that "it was not clear that state or federal environmental agencies would ever require clean ups at any of AGC's former MGP sites." 68 F.3d at 415.

In arriving at the foregoing conclusion, this Court is not unmindful of the Seventh Circuit's decision in Bankers Trust Co. v. Old Republic Ins. Co., 959 F.2d 677, 681 (7th Cir.1992) and its language to the effect that "Article III requires only a probabilistic injury" — which present plaintiff claims to be "dispositive." (Ans.Br. p. 10). Rather than being "dispositive," this Court is of the view that that case is distinguishable.

There, the insured had in fact been sued by a third party before the declaratory judgment action regarding coverage was brought and the only remaining questions were whether the insured would win or lose the suit and the amount of the judgment. While indicating that cases such as Wooten v. Loshbough, 951 F.2d 768, 769 (7th Cir.1991) had spoken in terms of "probabilistic injury," the court in Bankers Trust indicated that "this doesn't mean that any probability, however slight, is enough to permit a suit to be maintained in federal court. We are dealing with matters of degree." 959 F.2d at 681.[5] Since the insured's liability (or the possibility that judgment would be less than the coverage amount) was a contingency which did not take the case out of Article III's grant of jurisdiction, the mere possibility that the declaratory relief requested may be rendered moot by the proceedings below was simply a factor relevant to the district court's exercise of equitable discretion to grant or withhold declaratory relief.

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[4] On November 20, 1995, Timothy R. Johnson of the IDEM sent a letter to Indiana Gas which indicates that IDEM is "assessing" all former manufactured gas plants in Indiana. That letter, however, does not create a case or controversy for two reasons. First, it does not give any orders or directives to Indiana Gas to remediate or further investigate its former manufactured gas plants. Rather, it merely requests general information about former manufactured gas plant properties. Second, the letter has no bearing on this case since it was sent over seven months after this lawsuit was filed and, as indicated previously, justiciability is evaluated based on the state of affairs at the time of the filing of the complaint.

Here, unlike Bankers Trust, but like Atlanta Gas, there has been no suit filed against the plaintiffs and no indication or notice that that will occur with respect to the sites in question. At present, the controversy alleged in plaintiffs' complaint for declaratory judgment relating to those sites is nothing more than hypothetical: if a government agency issues an order or notice; or if an agency requires plaintiffs to take some action with regard to the sites; or if a third party makes a claim; or if a third party files litigation against plaintiffs based on contaminants at those sites; or if plaintiffs incur costs to clean up the sites, there may be coverage for those currently non-existent claims, orders, directives or costs. Such are now mere possibilities, not probabilities, and accordingly the motion to dismiss must be granted.

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[5] In its opinion, the court pointed out that many cases in the Seventh Circuit have been read as indicating "that a suit to determine an insurer's obligation to indemnify its insured is premature until the insured has been determined to be liable to somebody," 959 F.2d at 680 (collecting cases), and that "[o]ther circuits take a more liberal view." Id. The Court went on to note, however, that "our cases state a general rule rather than an absolute one." Id.

Conclusion

On the basis of the foregoing, the "Motion to Dismiss Plaintiff's Claims for Declaratory Judgment as to the Richmond Site for Lack of Jurisdiction" filed July 10, 1996, by defendants St. Paul Fire & Marine Insurance Company, St. Paul Surplus Lines Insurance Company, Ranger Insurance Company, those London Market insurers severally subscribing to policies of excess insurance in favor or Richmond Gas Corporation, and Home Insurance Company is GRANTED. Likewise, plaintiffs' request for declaratory judgments with respect to the manufactured gas plants at Bedford, Greencastle, Huntington, Marion, Seymour and Terre Haute are DISMISSED. Said dismissals are WITHOUT PREJUDICE.

SO ORDERED.

Appendix B

INDIANA GAS COMPANY, INC., Richmond Gas Corporation
d/b/a Indiana Gas Company, Inc. and Terre Haute Gas
Corporation d/b/a Indiana Gas Company, Inc.,
Plaintiffs,

v.

AETNA CASUALTY & SURETY COMPANY,
Connie Lee Insurance Company, Continental Casualty Company,
Continental Insurance Company, Greenwich Insurance
Company, Home Insurance Company, Certain Underwriters
at Lloyd's, London and Certain London Market Insurance
Companies, North River Insurance Company, Ranger Insurance
Company, St. Paul Fire & Marine Insurance Company, St. Paul
Surplus Lines Insurance Company and the
Travelers Company, Defendants.

No. 1:95-CV-101.

United States District Court,
N.D. Indiana,
Fort Wayne Division.

Oct. 2, 1996.

* * *

MEMORANDUM OF DECISION AND ORDER

WILLIAM C. LEE, District Judge.

This matter is before the Court on defendant Ranger Insurance Company's July 10, 1996, "Motion for Partial Summary Judgment

Concerning 'Property Damage During the Policy Period,' " a motion in which other defendants have joined. Plaintiffs responded to that motion on July 31, 1996, to which Ranger Insurance replied on August 9, 1996. For the following reasons, the motion for partial summary judgment will be granted.

Factual Background

Ranger issued Comprehensive General Liability policies to Richmond Gas Corporation for the period from 1975 to 1987 and also issued an Excess Liability policy and Commercial Umbrella Liability for the period 1975-1976. The Ranger policies, and those of the defendants who have joined in the motion, all contained language identical or substantially similar to the effect that the insurers agreed "to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . property damage to which this insurance applies caused by an occurrence." "Occurrence" is then defined as "an accident, including continuous or repeated exposure to conditions, which results in property damage neither expected nor intended from the standpoint of the insured." In turn, "property damage" is defined as "physical injury to or destruction of tangible property which occurs during the policy period."

Indiana Gas has identified three potential sources of contamination associated with the manufactured gas plants (MGP): (1) land disposal of MGP waters; (2) manufactured gas plant operations; and (3) decommissioning activities. There was contamination at each of the sites in question from the time that the contaminants first entered the groundwater and plaintiffs maintain that that contamination continues to the present day.

The specific sources of groundwater contamination at each site have been identified by Indiana Gas's hydrogeology expert, Dr. Thomas Prickett. Dr. Prickett conducted a hyrodgeologic study of groundwater flow and contaminant migration. According to him, the study provided the "most certain indication as to when and how [MGP] chemicals impacted the groundwater and migrated off the MGP sites."[1]

With respect to each of the sites which are at issue in the presently pending motion for partial summary judgment, the following is undisputed:

> (1) The Seymour Site. An MGP was in operation from 1886 to 1931 and the plant was substantially decommissioned prior to 1945. Dr. Prickett concluded that the groundwater at the site was contaminated by chemicals from the probable site sources by no later than 1954, and that contamination was off-site by no later than 1954.
>
> (2) The Bedford Site. The MGP was in operation from 1900 to 1940 and substantially decommissioned prior to 1945. Dr. Prickett concluded that the groundwater at the site was contaminated by chemicals from the probable site by no later than 1954 and that contamination was off-site by no later than 1954.
>
> (3) The Huntington Site. The MGP was in operation from 1883 to 1926 and substantially decommissioned by 1945. Dr. Prickett identifies the sole source of groundwater contamination at the site as the "dismantling of [a] holder and filling the base with MGP materials about 1937." Contaminants had entered the groundwater and moved off-site in 1937.

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[1] To do this, Dr. Prickett focused on "the most widespread, fastest moving and reoccurring chemicals at the site."

Appendix B

(4) The Lafayette Site. An MGP was in operation from 1852 to 1937 and the plant substantially decommissioned by 1945. Releases of hazardous substances at the site resulted in off-site damage to soil and/or groundwater no later than 1952.

(5) The Shelbyville Site. An MGP was in operation from 1925 to 1946. Dr. Prickett concluded that the groundwater at the site was contaminated by chemicals from the probable site sources by no later than 1925 and that contaminants had moved off-site by no later than 1940.

(6) The Richmond Site. An MGP was in operation from 1855 to 1941. Dr. Prickett concluded that the groundwater at the site was contaminated by chemicals from the probable site sources by no later than 1914, and that contaminants had moved off-site by no later than 1919.

(7) The Terre Haute Site. The MGP was in operation from 1886 until the 1930s. Dr. Prickett concluded that the groundwater at the site was contaminated by chemicals from the probable site sources by no later than 1899, and that contaminants had moved off-site by no later than 1924.

Thus with respect to all of the foregoing sites, the groundwater had become contaminated and the contaminants had begun to move off-site by no later than the mid-1950s. There is, however, evidence to suggest that the groundwater from the former MGPs is still running into streams and rivers located near at least six of the sites.

Application of Law

As indicated at the outset, this matter is presently before the Court on Ranger's motion for partial summary judgment concerning the issue of whether any property damage occurred during the relevant policy periods, a motion in which several of the other defendants have joined. After a review of the summary judgment standards, the parties arguments will be addressed.

A. Summary Judgment Standards

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). However, Rule 56(c) is not a requirement that the moving party negate his opponent's claim. Fitzpatrick v. Catholic Bishop of Chicago, 916 F.2d 1254, 1256 (7th Cir.1990). Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery, against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and in which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). The standard for granting summary judgment mirrors the directed verdict standard under Rule 50(a), which requires the court to grant a directed verdict where there can be but one reasonable conclusion. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). A scintilla of evidence in support of the non-moving party's position is not sufficient to successfully oppose summary judgment; "there must be evidence on which the jury could reasonably find for the plaintiff." Id. at 252, 106 S.Ct. at 2512; In re Matter of Wildman, 859 F.2d 553, 557 (7th Cir.1988);

Klein v. Ryan, 847 F.2d 368, 374 (7th Cir.1988); Valentine v. Joliet Township High School District No. 204, 802 F.2d 981, 986 (7th Cir.1986). No genuine issue for trial exists "where the record as a whole could not lead a rational trier of fact to find for the nonmoving party." Juarez v. Ameritech Mobile Communications, Inc., 957 F.2d 317, 322 (7th Cir.1992) (quoting Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986)).

Initially, Rule 56 requires the moving party to inform the court of the basis for the motion, and to identify those portions of the "pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, which demonstrate the absence of a genuine issue of material fact." Celotex, 477 U.S. at 323, 106 S.Ct. at 2553. The non-moving party may oppose the motion with any of the evidentiary materials listed in Rule 56(c), but reliance on the pleadings alone is not sufficient to withstand summary judgment. Goka v. Bobbitt, 862 F.2d 646, 649 (7th Cir.1988); Guenin v. Sendra Corp., 700 F.Supp. 973, 974 (N.D.Ind.1988); Posey v. Skyline Corp., 702 F.2d 102, 105 (7th Cir.), cert. denied, 464 U.S. 960, 104 S.Ct. 392, 78 L.Ed.2d 336 (1983).

So that the district court may readily determine whether there are genuine issues of material fact, under Local Rule 56.1, the moving party is obligated to file with the court a "Statement of Material Facts" supported by appropriate citation to the record to which the moving party contends there is no genuine issue. In addition, the non-movant is obligated to file with the court a "Statement of Genuine Issues" supported by appropriate citation to the record all material facts to which the non-movant contends there are exists a genuine issue necessary to be litigated. See

Waldridge v. American Hoechst Corp. et al., 24 F.3d 918 (7th Cir.1994). In ruling on a summary judgment motion the court accepts as true the non-moving party's evidence, draws all legitimate inferences in favor of the non-moving party, and does not weigh the evidence or the credibility of witnesses. Anderson, 477 U.S. at 249-51, 106 S.Ct. at 2511. However, "[i]t is a gratuitous cruelty to parties and their witnesses to put them through the emotional ordeal of a trial when the outcome is foreordained," and in such cases summary judgment is appropriate. Mason v. Continental Illinois Nat'l Bank, 704 F.2d 361, 367 (7th Cir.1983).

Irrelevant or unnecessary facts do not preclude summary judgment even when they are in dispute because the issue of fact must be genuine. Fed.R.Civ.P. 56(c), (e). To establish a genuine issue of fact, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586, 106 S.Ct. at 1356; First National Bank of Cicero v. Lewco Securities Corp., 860 F.2d 1407, 1411 (7th Cir.1988). The non-moving party must come forward with specific facts showing that there is a genuine issue for trial. Id. A summary judgment determination is essentially an inquiry as to "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 251-52, 106 S.Ct. at 2512.

B. Property Damage During the Policy Period

"Under Indiana law, the interpretation of an insurance policy presents a question of law to be decided by the court." Cincinnati Ins. v. Flanders Elec. Motor Service, 40 F.3d 146, 151 (7th Cir.1994) (citing Tate v. Secura Ins., 587 N.E.2d 665, 668 (Ind.1992). "The insured has the initial burden of proving coverage under an insurance policy." Flanders at 151 (citing Southbend Escan Corp. v. Federal Ins. Co., 647 F.Supp. 962, 966 (N.D.Ind.1986)). Here, there is no dispute that plaintiffs' right to coverage under the insurance contracts is only "triggered" if there was property damage during an insurer's policy period.

"Trigger of coverage" has been defined as follows:

> " '[T]rigger of coverage' has been used by insureds and insurer alike to denote the circumstances that activate the insurer's defense and indemnity obligations under the policy. The term 'trigger of coverage' should not be misunderstood as a doctrine to be automatically invoked by the court to conclusively establish coverage in certain categories of cases, or under certain types of policies. The word 'trigger' is not found in the CGL policies themselves. . . . Instead, 'trigger of coverage' is a term of convenience used to describe that which, under the specific terms of an insurance policy, must happen in the policy period in order for the potential of coverage to arise. The issue is largely one of timing — what must take place within the policy's effective dates for the potential of coverage to be 'triggered.' "

Montrose Chem. Corp. v. Admiral Ins. Co., 10 Cal.4th 645, 42 Cal.Rptr.2d 324, 327 n. 2, 913 P.2d 878, 881 n. 2 (1995). Four principal theories regarding trigger of coverage have been recognized:

> If coverage is triggered at the time that personal injury or property damage becomes known to the victim or

> property owner, the approach is identified as the 'manifestation theory.' If coverage is triggered when real personal injury or actual property damage first occurs, the approach is called the injury in fact theory. If coverage is triggered when the first exposure to injury- causing conditions occur then the court is said to have chosen the 'exposure theory.' Finally, if coverage is triggered in a manner such that insurance policies in effect during different time periods all impose a duty to indemnify, then the approach is labeled a 'continuous' or 'multiple' trigger theory.

Dow Chemical Co. v. Associated Indemnity Corp., 724 F.Supp. 474, 478 (E.D.Mich.1989) (citations omitted).[2]

Given that there are at least four approaches to determine when coverage is "triggered," courts have taken different views as to when coverage attaches in the context of environmental contamination cases. For example, just last year, in Montrose, supra, the California Supreme Court determined that the proper approach is the continuous injury trigger theory. Montrose, 42 Cal.Rptr.2d at pp. 348-50, 913 P.2d at pp. 902-04; see also Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Co., 89 F.3d 976, 994-95 (3rd Cir.1996). Conversely, and also last year, the Minnesota Supreme Court in SCSC Corp. v. Allied Mutual Insurance Co., 536 N.W.2d 305, 318 (Minn.1995), employed the actual injury theory in determining how to allocate damages resulting from a spill which lead to continual leaching. See also, Armotek Industries v. Employers Ins. of Wausau, 952 F.2d 756 (3rd Cir.1991).

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[2] The "continuous" or "multiple" trigger theory has also been referred to as the "triple trigger theory" because it expresses the notion that the injury occurs during each of three phases of environmental contamination — exposure, exposure in residence and manifestation.

In the present matter Indiana Gas, not surprisingly, argues that the "multiple trigger" theory should apply here so that it can seek coverage under policies which became effective long after the manufactured gas plants had been decommissioned. In support of that position, Indiana Gas points to Eli Lilly & Co. v. Home Ins. Co., 482 N.E.2d 467 (Ind.1985) as the controlling Indiana law.

In this Court's view, Eli Lilly, a case involving DES, is not dispositive in this environmental case. In Dana Corporation v. Hartford Accident & Indemnity Co. et al., No. 49DO1-9301-CP-0026 (Marion Super. Sept. 10, 1996),[3] the Marion Superior Court cogently indicated why Eli Lilly can be limited to its facts:

> "[T]he Indiana cases addressing the trigger issue does not require the Court to adopt a continuous trigger in this case. Eli Lilly & Co. v. Home Ins. Co., 482 N.E.2d 467 (Ind.1985), the principal authority relied on by [plaintiff], adopted a continuous trigger in the context of progressive, DES-related diseases. That case is distinguishable, however. The Court in Eli Lilly found that the relevant policy language was ambiguous as it relates to DES claims — it was not clear whether the initial in utero exposure to DES (which must have caused some injury, since the exposure was not repeated, and allegedly caused numerous diseases 20 years later) was the relevant injury for coverage purposes, or whether the subsequent manifestation of

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[3] The decision in Dana was brought to this Court's attention as an attachment to a letter for counsel from London Market Insurers dated September 16, 1996. Indiana Gas, in a letter to this Court dated September 19, 1996, addressed the issues raised in the Dana decision. Both letters have been made a part of the record in this cause.

> disease was the relevant injury. In the environmental property damage context, however, there is no such ambiguity — it is not a question of which injury counts, but of when injury results. The Court in Eli Lilly did not suggest that coverage was first triggered when a doctor prescribed DES, or when a mother purchased the drug. Instead, the trigger period began at the date of the earliest actual injury."

Id. at pp. 351-52, 913 P.2d at pp. 905-06 (italics in original); see also Armotek supra at 763 (discussing the "unique character" of the problem created by policy language in the context of diseases with long latency periods as opposed to chemical contamination cases). This Court agrees with the foregoing language in Dana.

Further support for this Court's conclusion that Eli Lilly is not dispositive in this action can be found in the Indiana Court of Appeals post- Eli Lilly decision of Great Lakes Chemical Corp. v. International Surplus Lines Ins. Co., 638 N.E.2d 847 (Ind.App.1994). There, the court addressed the trigger issue in the context of a case involving the pesticide EDB. The court in Great Lakes indicated that it agreed with the "general rule" that "the time of the occurrence of an accident within the meaning of an indemnity policy is not the time the wrongful act was committed but the time when the complaining party was actually damaged." Id. at 854. Thus, on the facts before it, the court wrote that "the general rule simply holds that the time when the EDB pesticides were manufactured is not the time of the occurrence which triggers coverage, but the trigger for coverage is the time when the complaining party was damaged. Here, the City was damaged when the EDB pesticides were applied to the soil and contaminated the groundwater." Id.

Likewise here, the damage occurred when the property was contaminated, an event which occurred long before any of the relevant policies were issued. Indiana Gas's own expert, Dr. Prickett, admitted that the groundwater underlying each of the seven sites was contaminated and had contaminated third party property before the inception of the policies. No pollutants which could have caused third party property damage were ever discharged at the sites during any policy period because there were no MGP operations during those periods (the plants had been decommissioned) and Dr. Prickett has indicated that the sources of contamination were in existence and had already contaminated the groundwater and third party property before any policy period. Thus, under Great Lakes, present defendants' policies can not be triggered because the third party damage occurred before any policy period.

In reaching the foregoing conclusion that there was no property damage which occurred during the policy period as required by the policies, this Court is not unmindful of Indiana Gas's argument to the effect that there is evidence to suggest that groundwater from the former manufactured gas plants is running into bodies of water which surround the sites. This, however, does not salvage their claim.

In Inland Waters Pollution Control, Inc. v. National Union Fire Insurance Co., 997 F.2d 172 (6th Cir.1991),[4] the United States Court of Appeals for the Sixth Circuit was presented with, and rejected, a similar argument. There, drums containing liquid wastes were crushed during the first two months of 1981 allowing the wastes to leak into the soil. An examination six years later by the state department of natural resources revealed significant contamination. The policyholder sued its insurer under a policy which became effective some six months after the leak had occurred arguing that "the definition of 'occurrence' in the policies [was] broad enough to cover the damage to [the] property which was continually occurring during the policy periods as contaminants migrated through the soil and groundwater." Id. p. 182. The policy at issue (similar to that here) provided that coverage is triggered by property damage which occurred during the policy period. With respect to the allegation of continual leakage into the groundwater, the Sixth Circuit wrote:

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[4] This decision was originally unpublished but was subsequently published as an appendix to Inland Waters Pollution Control Inc. v. National Union Fire Ins. Co., 997 F.2d 172 (6th Cir.1993).

> Concerning damage to the groundwater, we hold that the district court erred by granting summary judgment because there is a genuine issue of material fact regarding when the groundwater first became contaminated. Although Inland Waters allowed liquid waste to escape into the soil in January or February 1981, it cannot be determined from the present record the length of time required for the contaminants to filter through the soil and reach the groundwater. If evidence establishes that the groundwater was first contaminated after August 1981, there could be coverage under the occurrence policy, and National Union could be liable for breach of the duty to defend. *On the other hand, if evidence established that the groundwater first became contaminated before August 1981, there would be no coverage, and, hence, no duty to defend.* Accordingly, we reverse and remand the case to the district court for resolution

> of the question of fact as to when the groundwater first became contaminated.

Id. at p. 187 (italics added).[5]

Here, there is no dispute that at all of the sites in question, the contamination occurred and the groundwater was affected prior to the policies at issue. While there still may be some continuing effect on the groundwater, there is no evidence that any new pollutants that could have damaged third party property were ever added to the environment during any of the policies at issue. Cf. Armotek supra 952 F.2d at 763 (regarding failure "to prove that separable injury to property occurred after 1979 as the chromic acid migrated underground").

Conclusion

In light of the foregoing, defendant Ranger Insurance Company's July 10, 1996, "Motion for Partial Summary Judgment Concerning 'Property Damage During the Policy Period'" is GRANTED. Summary Judgment is also entered on this issue in favor of all defendants who have joined in that motion.

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[5] A similar result was reached in SCSC Corp. supra. There, the actual injury to third party property occurred as a result of a 1977 spill. Despite the "continual leaching of chemicals from the soil into the groundwater," the Minnesota Supreme Court reversed the trial court's application of a "multi-year vertical trigger" which would have triggered all policies on the risk during the leaching and found that only the policies in effect in 1977 were liable. 536 N.W.2d at 318.

Appendix B

INDIANA GAS COMPANY, INC., et al.,
Plaintiffs,

v.

AETNA CASUALTY & SURETY COMPANY, et al.,
Defendants.

Civil No. 1:95cv101.

United States District Court,
N.D. Indiana,
Fort Wayne Division.

Oct. 2, 1996.

* * *

ORDER

WILLIAM C. LEE, District Judge.

This matter is before the court on the defendants' (London Market Insurers) "Motion for Summary Judgment on All Policies for Plaintiffs' Failure to Establish a Fortuitous Accident or Occurrence", filed on July 10, 1996.[1] The parties completed briefing the motion on August 9, 1996.

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[1] Other defendants have joined defendant London Market Insurers' motion for summary judgment.

Appendix B

Summary Judgment

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). However, Rule 56(c) is not a requirement that the moving party negate his opponent's claim. Fitzpatrick v. Catholic Bishop of Chicago, 916 F.2d 1254, 1256 (7th Cir.1990). Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery, against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and in which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The standard for granting summary judgment mirrors the directed verdict standard under Rule 50(a), which requires the court to grant a directed verdict where there can be but one reasonable conclusion. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). A scintilla of evidence in support of the non-moving party's position is not sufficient to successfully oppose summary judgment; "there must be evidence on which the jury could reasonably find for the plaintiff." Id. In Re Matter of Wildman, 859 F.2d 553, 557 (7th Cir.1988); Klein v. Ryan, 847 F.2d 368, 374 (7th Cir.1988); Valentine v. Joliet Township High School District No. 204, 802 F.2d 981, 986 (7th Cir.1986). No genuine issue for trial exists "where the record as a whole could not lead a rational trier of fact to find for the nonmoving party." Juarez v. Ameritech Mobile Communications, Inc., 957 F.2d 317, 322 (7th Cir.1992) (quoting Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986)).

Appendix B

Initially, Rule 56 requires the moving party to inform the court of the basis for the motion, and to identify those portions of the "pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any," which demonstrate the absence of a genuine issue of material fact, Celotex, 477 U.S. at 323, 106 S.Ct. at 2552-53. The non- moving party may oppose the motion with any of the evidentiary materials listed in Rule 56(c), but reliance on the pleadings alone is not sufficient to withstand summary judgment. Goka v. Bobbitt, 862 F.2d 646, 649 (7th Cir.1988); Guenin v. Sendra Corp., 700 F.Supp. 973, 974 (N.D.Ind.1988); Posey v. Skyline Corp., 702 F.2d 102, 105 (7th Cir.), cert. denied, 464 U.S. 960, 104 S.Ct. 392, 78 L.Ed.2d 336 (1983).

So that the district court may readily determine whether genuine issues of material fact exist, under Local Rule 56.1, the moving party is obligated to file with the court a "Statement of Material Facts" supported by appropriate citation to the record to which the moving party contends no genuine issues exist. In addition, the non-movant is obligated to file with the court a "Statement of Genuine Issues" supported by appropriate citation to the record outlining all material facts to which the non-movant contends exist that must be litigated. See, Waldridge v. American Hoechst Corp. et al., 24 F.3d 918 (7th Cir.1994). In ruling on a summary judgment motion the court accepts as true the non-moving party's evidence, draws all legitimate inferences in favor of the non-moving party, and does not weigh the evidence or the credibility of witnesses. Anderson, 477 U.S. at 249-251, 106 S.Ct. at 2511. Furthermore, in determining the motion for summary judgment, the court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy, except to the extent that such facts are controverted in the "Statement of Genuine Issues" filed in opposition to the motion. L.R. 56.1

Substantive law determines which facts are material; that is, which facts might affect the outcome of the suit under the governing law. Anderson, 477 U.S. at 248, 106 S.Ct. at 2510. Irrelevant or unnecessary facts do not preclude summary judgment even when they are in dispute. Id. The issue of fact must be genuine. Fed.R.Civ.P. 56(c), (e). To establish a genuine issue of fact, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586, 106 S.Ct. at 1355-56; First National Bank of Cicero v. Lewco Securities Corp., 860 F.2d 1407, 1411 (7th Cir.1988). The non-moving party must come forward with specific facts showing that there is a genuine issue for trial. Id. A summary judgment determination is essentially an inquiry as to "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 251-252, 106 S.Ct. at 2511. Finally, the court notes that, "[i]t is a gratuitous cruelty to parties and their witnesses to put them through the emotional ordeal of a trial when the outcome is foreordained" and in such cases summary judgment is appropriate. Mason v. Continental Illinois Nat'l Bank, 704 F.2d 361, 367 (7th Cir.1983).

Discussion

The plaintiffs, Indiana Gas Company, Inc., Richmond Gas Corporation and Terre Haute Gas Corporation (collectively "Indiana Gas"), commenced this action by filing a complaint for declaratory judgment and breach of contract because of the refusal of the five remaining defendant insurance companies to pay claims for third-party property damage tendered to them by Indiana Gas under comprehensive general liability insurance policies. According to Indiana Gas, the underlying property damage arises out of the historical gas manufacturing operations that took place at certain properties now owned by Indiana Gas.

Appendix B

From the early 1800's until natural gas became widely available in the 1940's and 1950's, gas for heating, lighting and cooking was manufactured by superheating coal and, later, coal combined with oil. During the manufactured gas era, more than 1,500 cities and towns across the country had a town gas plant that manufactured and stored gas until it was distributed directly to the homes and businesses of the town through a pressurized underground gas pipeline distribution system. The gas manufacturing process created tar, as well as other residuals and wastes, as a by-product. Unfortunately, the residuals, wastes and by-products from the gas manufacturing process contained hazardous constituents, such as benzene, which have been discovered in the subsurface soil and groundwater at properties where these manufactured gas plants ("MGPs") were operated. Nine such former MGP sites: Shelbyville, Lafayette, Bedford, Greencastle, Huntington, Marion, Richmond, Seymour, and Terre Haute, Indiana, are at issue in the claims for property damage which underlie this lawsuit for insurance coverage.

Indiana Gas claims that it has incurred and will continue to incur millions of dollars in liabilities as the result of state and federal law requirements to respond to the property damage at and near certain former MGP sites. According to Indiana Gas, damage to groundwater beneath the former MGP sites from subsurface leaching and migration began at most locations prior to 1955 and continues to the present day.

In support of its motion for summary judgment, defendant London Market Insurers ("LMI") argues that the damages caused by intentional acts are not covered by insurance under Indiana law, as fortuity is inherent in every contract of insurance. LMI takes the position that the "occurrences" or "accidents" which Indiana Gas contends are covered under the policies are the continuing releases of hazardous substances which derived from routine business operations and, thus, constitute intentional acts rather than accidents. LMI argues that Indiana Gas mistakenly focuses on the result of its intentional acts, by contending that "occurrences" and "accidents" have taken place because of the damages arising out of the deliberate and intentional acts associated with the routine operations of MGPs.

LMI strongly contends that it must be shown that an "accident" occurred before the inquiry focuses on the question of whether any resultant damage was expected or intended, as required by the relevant policies. LMI primarily relies on Fidelity and Guar. Ins. Underwriters, Inc. v. Everett I. Brown Co., L.P., 25 F.3d 484 (7th Cir.1994); Red Ball Leasing v. Hartford Accident & Idem. Co., 915 F.2d 306 (7th Cir.1990); and Transamerica Ins. Serv. v. Kopko, 570 N.E.2d 1283 (Ind.1991). This case law clearly supports LMI's position.

In Brown, the Seventh Circuit Court of Appeals expressly acknowledged the distinction between the issue of whether an act is an "accident", and the issue of whether the damages arising from that act are "expected or intended". In reconciling two Indiana appellate decisions with Red Ball Leasing, an earlier Seventh Circuit opinion, the Court explained that:

> At first glance, it may appear that Bolin [v. State Farm Fire & Casualty Co., 557 N.E.2d 1084 (Ind.Ct.App.1990)] and [Auto Owners Ins. Co. v.] Stroud, [565 N.E.2d 1093 (Ind.Ct.App.1991)], are inconsistent with Red Ball Leasing. However, a more exacting look reveals that these cases are not inconsistent. In both Bolin and Stroud, the insurance companies argued that there was no "occurrence"

> because the insured had "expected or intended" to cause the injury in question. In Red Ball Leasing, however, the insurance company did not argue that the insured "expected or intended" to cause injury. Rather, the insurance company contended that there was no "occurrence" because Red Ball had engaged in intentional conduct which was not an "accident". In essence, the Indiana courts have focused on different terms in the definition of "occurrence" than we have.

Brown, 25 F.3d at 488. The Seventh Circuit then continued with the following language:

> Moreover, the Indiana Supreme Court recently held that intentional conduct is not "accidental" and thus not an "occurrence." (Citing Transamerica Ins. Servs. v. Kopko, 570 N.E.2d 1283 (Ind.1991)).

Id.

Red Ball Leasing, which was discussed in Brown, is an earlier Seventh Circuit opinion which held that a volitional act is not an "accident". In Red Ball Leasing, a truck leasing company repossessed leased trucks after an accounting system erroneously indicated that lease payments had not been made on the trucks. The lessee subsequently sued Red Ball Leasing for conversion, breach of contract, and interference with business opportunities. Red Ball Leasing requested that its insurance carrier represent it in the action. The Seventh Circuit affirmed the district court's grant of summary judgment in favor of the insurer, concluding that: "Even if the mistake in Red Ball's accounting procedures triggered the chain of events that ultimately led to the repossession, the decision to take the trucks--an intentional act of Red Ball — is not an 'accident' under the terms of the insurance policy." 915 F.2d at 311-12.

The holding in Red Ball Leasing was reaffirmed in City of Jasper, Ind. v. Employers Ins. of Wausau, 987 F.2d 453, 457 (7th Cir.1994):

> An "accident" for our purposes is defined as "an unusual, unexpected, and unforeseen event." Red Ball Leasing, 915 F.2d at 309; 11 Couch, supra, § 44:288 at 433. The incident at issue does not satisfy this definition. What happened here, stripped to its essentials, is that an "action," not an "accident", of the City granted Mr. Habig the right to build two duplexes on his land, to the unhappiness of his neighbors who thereupon filed suit. The action was taken purportedly in harmony with the City's zoning regulations, and Habig acted on that in constructing the duplexes. Plainly, by the allegations of the complaint itself, the City's action was prompted by its conclusion that it was authorized by the zoning ordinance and quite as plainly after much litigation, the Court of Appeals of Indiana concluded that it was not. (Footnote omitted). But the City's error and the fact that the property damage could have been avoided does not transform the intended action into an "accident". "A volitional act does not become an accident simply because the insured's negligence prompted the act." Red Ball Leasing, 915 F.2d at 311.

Red Ball Leasing was also followed by Judge McKinney of the Southern District of Indiana in Allstate Ins. Co. v. Norris, 795 F.Supp. 272 (S.D.Ind.1992). In Norris, the insured shot a bystander while attempting to "pin down" an assailant. The insurer sought a declaration that the insured's homeowner's policy did not cover the bystander's injuries because the injuries were not the result of an "accident". The policy at issue in Norris provided that "Allstate will pay damages which an insured person becomes legally obligated to pay because of bodily injury or property damage *arising from an accident* and covered by this part of the policy." (Emphasis added.)

After discussing the facts of Red Ball Leasing, Judge McKinney stated:

> Under the Red Ball analysis, Duane's injuries here clearly did not result from an accident, and therefore are not covered under Norris's policy. This result obtains even if one assumes that Norris did not fire his gun at anyone in particular, because it is undisputed that he meant to fire his gun, and that he meant to fire it in the direction of the house where Duane was standing. Norris's actions therefore were volitional, and clearly not accidental, whether or not their consequences were unforeseen. Thus, Duane's injuries are not covered.

795 F.Supp. at 275.

Similarly, in Terre Haute First Nat'l Bank v. Pacific Employers Insurance Co., 634 N.E.2d 1336, 1338 (Ind.App.1993), the Indiana Court of Appeals stated:

> The Policy states simply that "'[o]ccurrence' means an accident." In the context of insurance coverage, an accident means an unexpected happening without an intention or design. National Mutual Insurance Co. v. Eward (1987), Ind.App., 517 N.E.2d 95, 100. Elkins'

> complaint alleged the Bank's negligence and breach of fiduciary duty in acting as his guardian. In other words, the claim against the Bank arose from a professional relationship and not from an accident. The Bank's purported professional negligence in acting as Elkins' guardian cannot be an accident in the plain and ordinary meaning of that term.

Indiana Gas, however, has taken the position that the "accident" for which it seeks coverage is the unexpected and unintended continuous migration of MGP by-products and residuals through the soil and groundwater and the property damage that has taken place as a result of that migration. In spite of the strong Seventh Circuit precedent discussed above, Indiana Gas relies on Stillwell v. Brock Brothers Inc., 736 F.Supp. 201 (S.D.Ind.1990), for the proposition that it is the *damage* and not the fortuitous act, which constitutes an "accident". In Stillwell, the plaintiff homeowners had their house re-roofed by the defendant in May of 1987. The re-roofing was performed in a negligent manner, and when the plaintiffs first turned on the gas furnace in their house in October of 1987, they suffered personal injury from smoke and fumes that became trapped in the house as a result of the negligent re-roofing. Although the plaintiffs' insurance policy had terminated on August 10, 1987, they sought coverage under the policy. 736 F.Supp. at 204, 205. The district court granted summary judgment in favor of the insurance company, finding that the term "accident" was not ambiguous, and ruling that:

> "[A]ccident" refers to the fruits of a negligent act, not to the sowing of the seeds. It is consequence, not cause, that constitutes an accident. Transamerica's failure to define "accident" within the policy does not render the word ambiguous.

736 F.Supp. at 206.

In reply to Indiana Gas' reliance on Stillwell, LMI points out that the district court in Stillwell did not have the benefit of the Brown, Red Ball, or Kopko decisions. After careful consideration of all the relevant case law, this court finds the case law supporting LMI's position (and discussed extensively supra) to be the better reasoned opinions. Clearly, an intentional act, even one that causes damage, is simply not an accident, even though the damage itself may have been unexpected or unintended.

Other states, including California, have recognized this principle. For example, in IMCERA Group, Inc. v. Liberty Mutual Insurance Co., 10 Mealy's Litigation Reports — Insurance # 18 (Calif.Ct. of App.2d Dist. Div. 1) (March 12, 1996), review granted, 54 Cal.Rptr.2d 41, 917 P.2d 1164 the California Court of Appeals held that:

> Even if an "accident" under Liberty's 1967-1971 policies can be a gradual (non-sudden) event, it definitely cannot be an intentional act. (See Shell Oil Co. [v. Winterthur Swiss Ins. Co., supra, 12 Cal.App.4th [715] at pp. 748- 751 [15 Cal.Rptr.2d 815 (1993)]). In this case, the trial court found that IMCERA intentionally discharged pollutants onto the soil and that "[a]ny accidents were purely incidental to normal operation of any manufacturing plant and did not change the picture of gradual pollution over time." Consequently, because the cause of the property damage was intentional, not accidental, no coverage or duty to indemnify existed under the policies. The fact that some "incidental" accidents may have contributed to the contamination does not change this result. "[A] company which engages in systematic pollution as a concomitant of its normal business

> practice cannot claim that such pollution was 'accidental' ". (N.H. Ball Bearings v. Aetna Cas. and Sur. Co. (1st Cir.1995) 43 F.3d 749, 754, discussing Great Lakes Container v. National Union Fire Ins. (1st Cir.1984) 727 F.2d 30, 33; accord, Lumbermens Mut. v. Belleville Industries (1st Cir.1991) 938 F.2d 1423, 1428-1430 [where manufacturer engaged in intentional, continuous pattern of pollution as part of business operation, occasional accident resulting in pollution did not confer coverage under liability policy], cert. den. 502 U.S. 1073 [112 S.Ct. 969, 117 L.Ed.2d 134 (1992)].)

IMCERA at 54-55 (footnotes omitted).

Moreover, the distinction between an "accident" or fortuity (the act) and "damages" (the result) is inherent in every contract of insurance. As stated by R.E. Keeton in Insurance Law:

> A requirement that loss be accidental in some sense in order to qualify as the occasion for liability of an insurer is implicit, when not express, because of the very nature of insurance.

R.E. Keeton, Insurance Law § 5.4(a), at 288 (1971), quoted in Ostrager & Newman, Handbook on Insurance Coverage Disputes § 8.02[a], at 308 (8th ed. 1995). Thus, it is clear that it is imperative for an "accident" to have occurred before the issue of whether the damages resulting therefrom were expected or intended need even be considered.

In the present case, Indiana Gas has not made any showing that the acts causing the damages at issue were not intentional.

Rather, Indiana Gas claims that there is no "intentional acts" exclusion in the policies, and that at least one of the defendants has acknowledged that its policies cover the unintended consequences of intentional acts. Indiana Gas relies heavily on Aetna's ten-year old internal claims handling manual, which states that:

> [I]t is important to understand that intentional acts of an insured may not be excluded. It is only when the resulting bodily injury or property damage is expected or intended from the standpoint of the insured that coverage is excluded for failure to satisfy the occurrence definition. This is a question of fact and often involves a degree of uncertainty.

Aetna Casualty & Sur. Co., Commercial Technical Claim Manual, § F-1 at F-1-18 (June 1986).

In its reply brief, LMI first points out that Aetna's claim manual is not pertinent to the policies issued by any defendant other than Aetna. Further, LMI argues that the language of the policies at issue is clear and unambiguous and, thus, extrinsic evidence cannot properly be considered by this court. This court agrees with LMI.

Citing to Freeman v. Commonwealth Life Ins. Co., 149 Ind.App. 211, 271 N.E.2d 177 (1971) and Weinand v. Johnson, 622 N.E.2d 1321 (Ind.App.1993), Indiana Gas argues that the Indiana courts have found the term "accident" to be ambiguous. However, as LMI notes, in Weinand, the Indiana court simply acknowledged that in Indiana it is reversible error to instruct the jury that a plaintiff may not recover if his damages are the result of a "mere" or "pure" accident. The Weinand court went on to state that "[s]uch instructions are misleading because they suggest that a defendant is not liable for causing a 'mere accident,' even though the defendant may have been negligent in causing the 'accident.'" 622 N.E.2d at 1324-25. Clearly, Weinand is not applicable to the present case.

Likewise, Freeman held that the term "accident" is ambiguous to laypersons because the term is often used to describe events caused by negligence and fault. Thus, with respect to a contract of adhesion, "reasonable foreseeability" was held to not be the proper test for determining whether the means by which an injury or death was caused was "accidental". 271 N.E.2d at 184. As the present case does not involve a life insurance policy, Freeman has little (if any) applicability to the present case. Moreover, language such as that used in the insurance contractsat issue here was held to be unambiguous by the Indiana Supreme Court in Kopko, supra, and also by the Stillwell court.

Indiana Gas has also relied on Eli Lilly Co. v. Home Ins. Co., 482 N.E.2d 467 (Ind.1985), in support of its position that the term "accident" is ambiguous. However, as LMI argues, the Eli Lilly court did not consider whether the bodily injury in that case was an "accident". Thus, the court had no occasion to determine whether the term "accident" was ambiguous. Rather, the Eli Lilly court held that the determination of when the injury occurred for purposes of the relevant policies was ambiguous, as at least two possible time considerations, exposure and manifestation, were relevant. As it was presumed that Eli Lilly did not intentionally manufacture a product that would injure people, the sole issue was which policies were required to respond to the claim, not whether any policies would respond.

Indiana Gas also cites to Indiana Ins. Co. v. O.K. Transport, Inc., 587 N.E.2d 129 (Ind.App.1992), for the proposition that "a split of authority among court decisions in construing a term in an insurance policy demonstrates that the term is ambiguous as a matter of law." (Answer brief at p. 7). In O.K. Transport, the court stated that "[b]ased on the policy language alone, we are unable to conclude which result was intended by the parties. Both interpretations strike us as reasonable." 587 N.E.2d at 132. The court then noted that other courts were fairly equally divided on the issue, and then cited a sampling of cases "as examples supporting the proposition that reasonably intelligent people can differ" about the contract language at issue. Id. The O.K. Transport court did not, as Indiana Gas argues, hold that the split of authority conclusively demonstrated that the policy language was ambiguous.

Additionally, as LMI recognizes, this court has recently rejected the approach advocated by Indiana Gas. In United Capitol Ins. Co. v. Special Trucks, Inc., 918 F.Supp. 1250 (N.D.Ind.1996), this court conducted a lengthy analysis of several terms in an insurance policy. Only after first looking for Indiana precedent did this court then search for decisions in other jurisdictions and considered those cases pro and con to the parties' respective positions. Id. at 1255. This court did not first look to see whether other courts were split on the issue and then mechanically rule in favor of the policyholder. LMI suggests that, just as in United Capitol, this court should first look to see whether any Seventh Circuit precedent exists holding the "occurrence" definition to be unambiguous as a matter of Indiana law.

In Red Ball Leasing, supra, 915 F.2d at 308-09, the Seventh Circuit found language similar to the language at issue in the present case to be clear and unambiguous. Later in Brown, 25 F.3d at 486-87, the Seventh Circuit reaffirmed Red Ball Leasing, finding no ambiguity in a policy defining an "occurrence" as "an accident . . . which results in bodily injury or property damage. . . ."

This court will follow Red Ball Leasing and Brown, and thus finds the term "accident" to be clear and unambiguous. Therefore, Indiana Gas' citation to extrinsic evidence is improper, as extrinsic evidence is inadmissible where no ambiguity exists in the contract. City of Evansville v. Old State Util. Corp., 550 N.E.2d 1339, 1342 (Ind.App.1990).

Certain of LMI's policies contain the following definition of the term "occurrence", in these words or in substantially similar language:

> The term "occurrence" whenever used herein shall mean one happening or series of happenings, arising out of or due to one event taking place during the term of this contract.

LMI has taken the position that this wording requires that a "causative event" take place during the policy period, regardless of when any third party property damage takes place. In support of this interpretation, LMI cites to Pacific Resources Inc. v. Oswego Shipping Corporation, No. 81 CIV. 7971, 1984 WL 928 (S.D.N.Y. Sept. 26, 1984); Babcock & Wilcox Co. v. Arkwright-Boston Mfg. Mutual Ins. Co., No. 5:91CV 0987 (E.D.Ohio, August 19, 1993), aff'd 53 F.3d 762 (6th Cir.1995); and Public Service Elec. & Gas Co. v. Certain Underwriters at Lloyd's London, ("PSE & G ") Civ. Action 88- 4811 (JCL) (D.N.J.1994).

In Pacific Resources, an insurance policy defined "occurrence" as a "happening or series of happenings, arising out of or due to one event taking place during the term of this policy." The issue involved coverage for the loss of a vessel which was sold in 1975 by an entity which knew it to be unseaworthy. Cracks developed in the vessel's side plates during a voyage two years later, in 1977. An explosion resulted and the vessel sank. The district court held that the policy applicable to the loss was the 1975 policy which was in effect when the vessel was sold, rather than the policy in effect when the vessel sank. The district court explained that the policy was an "occurrence" policy rather than a "claims-made" policy, and thus protected the insured from liability for any act done while the policy was in effect. In contrast, a "claims made" policy protects the insured against claims made during the life of the policy. The district court then specifically held:

> As discussed above, the "event" giving rise to the plaintiffs' loss was the sale of the vessel with the alleged nondisclosures. The fact that the "happening" which precipitated the claim occurred in 1977 when the 1975 policy was no longer in effect does not prevent plaintiff from recovering under the 1975 policy. The liability arose out of an event which occurred in 1975 when the policy was in effect.

Pacific Resources, 1984 WL 928 at *4.

In Babcock & Wilcox, as in Pacific Resources and the case at bar, the term "occurrence" was defined to mean "any happening or series of happenings, arising out of or due to one event taking place during the term of this contract. . . ." The plaintiff/insured claimed that the definition of "occurrence" did not require that the event which was the cause of the personal injury to occur during the policy term, but rather, the policy required that the happening (the injury) occur during the policy period. The Babcock & Wilcox court discussed this policy language, and the plaintiff/insured's interpretation thereof, as follows:

> Broken into its components, the definition of occurrence has four relevant parts: "[1] any happening

> or series of happenings, [2] arising out of or due to [3] one event [4] taking place during the term of this contract." Plaintiff's analysis focusses primarily upon the first and third portions of the definition.
>
> Such an interpretation requires the court to ignore the plain import of the sentence; it would have this court apply a phrase at the end of the sentence to a phrase at the beginning of the sentence without regard to any of the material which lies between. Given the fact that the temporal restriction follows the term "event" and is contained in an independent phrase separated from the description of happening by a comma, the plain meaning of the sentence is that the event, not the happening, must occur during the term of the contract.

Id. at 27. This portion of the district court's opinion was adopted by the Sixth Circuit Court of Appeals. See 53 F.3d at 766.

Finally, in PSE & G, the New Jersey District Court had before it an action involving a declaratory judgment for alleged liability arising out of historic manufactured gas operations. The policies at issue defined the term "occurrence" to mean "one happening or series of happening arising out of or caused by one event taking place during the term of this contract." This language is identical to the language in the present case, as well as the language in Babcock & Wilcox and Pacific Resources, except the defining phrase does not have a comma after the word "happening". Nevertheless, the court followed Babcock & Wilcox and Pacific Resources, stating that:

> The Court is satisfied that, absent the comma, the definition of "occurrence" in the 1975-79 policies

> should be interpreted the same as the corresponding definitions in Pacific Resources and Babcock & Wilcox, to require that the "event" take place during the policy period. Further, the Court finds that the "event" alluded to in the policy definition refers to the contamination itself, such as a leak or spill, and not to any subsequent leaching or migration of contaminants. Rather, under the definition leaching or migration would qualify as the "happening or series of happenings arising out of . . . [the] event." Therefore, the Court holds that the 1975-79 policies may be triggered only if Public Service is able to present evidence that an "event" as described in the policy definition of "occurrence," occurred during the policy period.

Id. at 12-13.

Indiana Gas argues that the "occurrence" definition in the policies at issue is ambiguous and must be construed in favor of Indiana Gas. Indiana Gas cites to Northern Shipping Co. v. Arkwright Boston Manufacturers Mutual Insurance Company, 617 F.Supp. 136, 138 (E.D.Pa.1985), in support of its argument. However, in Northern Shipping, the district court did not rule that the "occurrence" language was ambiguous. Rather, the district court simply applied the language as it was written in the policy to the facts of the case before it. Indiana Gas also cites to Commercial Union Ins. v. Pittsburgh Corning Corp., 553 F.Supp. 425, 434 n. 23 (E.D.Pa.1981). The Commercial Union court simply stated, without discussion, that "the policy is unclear on whether the 'occurrence' or the 'injury' must occur during the policy period. This ambiguity also must be construed in the insured's favor." This court first notes that in Northern Shipping, the court did not follow its own decision in Commercial Union. Thus, this court finds Commercial Union to be of little value. Additionally, a decision relied upon by Indiana Gas in support of its argument that the "causative event" need not take place during the policy period, Washington Natural Gas Co. v. Aetna Casualty & Surety Co., No. 91-2-13506-1 (Wash.Super.Ct., King Cty. Sept. 23, 1993), reported in Mealey's Lit.Rep.: Insurance, Vol. 7, Iss. 44 (Sept. 28, 1993) at p. 5, Sec. F., involved the exact same policy language as is present in the case at bar. The Washington Natural Gas court stated:

> The Stone & Webster policies contained language that may properly be portrayed as verbose or even redundant, but it is not language which is either ambiguous or in need of strained rules of construction.

Id. at 8. This court agrees that the language in the policy is not ambiguous.[2]

LMI acknowledges that the Washington Natural Gas court held that an "event" could be a "process" and "[a]s long as the process is continuous and is taking place during some or all of the term of the contract, it is covered." Id. However, LMI urges this court to follow the reasoning set forth in Babcock & Wilcox and PSE & G.

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[2] On August 9, 1996, LMI filed a motion to strike Exhibit 16 to Indiana Gas' answer brief. Exhibit 16 consists of the trial testimony of Leslie R. Dew in a 1990 California state court action. Indiana Gas submitted the exhibit in support of its argument that the "occurrence" language was ambiguous. LMI objects to Exhibit 16 for several reasons, including the reason that extrinsic evidence is not admissible to show ambiguity in a contract. As this court has found that the case law does not support Indiana Gas' argument that the language is ambiguous, and did not rely on Exhibit 16, LMI's motion to strike is moot.

This court agrees that the cases cited by LMI are the better reasoned opinions. Interpreting the "occurrence" language to provide coverage for "any happening . . . taking place during the term of this contract" would, as the Babcock & Wilcox court expressly recognized, ignore the plain meaning of the sentence by ignoring the restrictive "arising out of or due to one event" language. Thus, this court holds that the plain meaning of the language, when read as a complete sentence as intended, is to require that the "event" and not the "happening" take place during the term of the contract. As it is undisputed that some of the LMI policies at issue were not in effect during the time the MGP's were in operation, it is clear that summary judgment should be granted with respect to these policies.

Conclusion

For all of the foregoing reasons, summary judgment is hereby GRANTED in favor of LMI (and the joining defendants) with respect to the policies affected by this court's rulings as set forth in this order. Further, LMI's motion to strike Exhibit 16 to Indiana Gas' brief is hereby deemed MOOT.

Appendix B

INDIANA GAS COMPANY, INC., et al.,
Plaintiffs,

v.

AETNA CASUALTY & SURETY COMPANY, et al.,
Defendants.

Civil No. 1:95cv101.

United States District Court,
N.D. Indiana,
Fort Wayne Division.

Oct. 2, 1996.

* * *

ORDER

WILLIAM C. LEE, District Judge.

This matter is before the court on a "Motion for Partial Summary Judgment on the Pollution Exclusion" filed by the Home Insurance Company ("Home") on July 10, 1996.[1] Also before the court is "London Market Insurers' Motion for Summary Judgment on all Policies Containing the London Market Pollution Exclusion", which was also filed on July 10, 1996. The parties completed briefing the motions on August 9, 1996.

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[1] Other defendants have joined Home's motion for summary judgment.

Summary Judgment

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). However, Rule 56(c) is not a requirement that the moving party negate his opponent's claim. Fitzpatrick v. Catholic Bishop of Chicago, 916 F.2d 1254, 1256 (7th Cir.1990). Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery, against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and in which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The standard for granting summary judgment mirrors the directed verdict standard under Rule 50(a), which requires the court to grant a directed verdict where there can be but one reasonable conclusion. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). A scintilla of evidence in support of the non-moving party's position is not sufficient to successfully oppose summary judgment; "there must be evidence on which the jury could reasonably find for the plaintiff." Id. In Re Matter of Wildman, 859 F.2d 553, 557 (7th Cir.1988); Klein v. Ryan, 847 F.2d 368, 374 (7th Cir.1988); Valentine v. Joliet Township High School District No. 204, 802 F.2d 981, 986 (7th Cir.1986). No genuine issue for trial exists "where the record as a whole could not lead a rational trier of fact to find for the nonmoving party." Juarez v. Ameritech Mobile Communications, Inc., 957 F.2d 317, 322 (7th Cir.1992) (quoting Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986)).

Initially, Rule 56 requires the moving party to inform the court of the basis for the motion, and to identify those portions of the "pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, which demonstrate the absence of a genuine issue of material fact," Celotex, 477 U.S. at 323, 106 S.Ct. at 2552-53. The non- moving party may oppose the motion with any of the evidentiary materials listed in Rule 56(c), but reliance on the pleadings alone is not sufficient to withstand summary judgment. Goka v. Bobbitt, 862 F.2d 646, 649 (7th Cir.1988); Guenin v. Sendra Corp., 700 F.Supp. 973, 974 (N.D.Ind.1988); Posey v. Skyline Corp., 702 F.2d 102, 105 (7th Cir.), cert. denied, 464 U.S. 960, 104 S.Ct. 392, 78 L.Ed.2d 336 (1983).

So that the district court may readily determine whether genuine issues of material fact exist, under Local Rule 56.1, the moving party is obligated to file with the court a "Statement of Material Facts" supported by appropriate citation to the record to which the moving party contends no genuine issues exist. In addition, the non-movant is obligated to file with the court a "Statement of Genuine Issues" supported by appropriate citation to the record outlining all material facts to which the non-movant contends exist that must be litigated. See, Waldridge v. American Hoechst Corp. et al., 24 F.3d 918 (7th Cir.1994). In ruling on a summary judgment motion the court accepts as true the non-moving party's evidence, draws all legitimate inferences in favor of the non-moving party, and does not weigh the evidence or the credibility of witnesses. Anderson, 477 U.S. at 249-251, 106 S.Ct. at 2511. Furthermore, in determining the motion for summary judgment, the court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy, except to the extent that such facts are controverted in the "Statement of Genuine Issues" filed in opposition to the motion. L.R. 56.1

Substantive law determines which facts are material; that is, which facts might affect the outcome of the suit under the governing law. Anderson, 477 U.S. at 248, 106 S.Ct. at 2510. Irrelevant or unnecessary facts do not preclude summary judgment even when they are in dispute. Id. The issue of fact must be genuine. Fed.R.Civ.P. 56(c), (e). To establish a genuine issue of fact, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586, 106 S.Ct. at 1356; First National Bank of Cicero v. Lewco Securities Corp., 860 F.2d 1407, 1411 (7th Cir.1988). The non-moving party must come forward with specific facts showing that there is a genuine issue for trial. Id. A summary judgment determination is essentially an inquiry as to "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 251-252, 106 S.Ct. at 2512. Finally, the court notes that, "[i]t is a gratuitous cruelty to parties and their witnesses to put them through the emotional ordeal of a trial when the outcome is foreordained" and in such cases summary judgment is appropriate. Mason v. Continental Illinois Nat'l Bank, 704 F.2d 361, 367 (7th Cir.1983).

Discussion

The plaintiffs, Indiana Gas Company, Inc., Richmond Gas Corporation and Terre Haute Gas Corporation (collectively "Indiana Gas"), commenced this action by filing a complaint for declaratory judgment and breach of contract because of the refusal of the five remaining defendant insurance companies to pay claims for third-party property damage tendered to them by Indiana Gas under comprehensive general liability insurance policies. According to Indiana Gas, the underlying property damage arises out of the historical gas manufacturing operations that took place at certain properties now owned by Indiana Gas.

Appendix B

From the early 1800's until natural gas became widely available in the 1940's and 1950's, gas for heating, lighting and cooking was manufactured by superheating coal and, later, coal combined with oil. During the manufactured gas era, more than 1,500 cities and towns across the country had a town gas plant that manufactured and stored gas until it was distributed directly to the homes and businesses of the town through a pressurized underground gas pipeline distribution system. The gas manufacturing process created tar, as well as other residuals and wastes, as a by-product. Unfortunately, the residuals, wastes and by-products from the gas manufacturing process contained hazardous constituents, such as benzene, which have been discovered in the subsurface soil and groundwater at properties where these manufactured gas plants ("MGPs") were operated. Nine such former MGP sites: Shelbyville, Lafayette, Bedford, Greencastle, Huntington, Marion, Richmond, Seymour, and Terre Haute, Indiana, are at issue in the claims for property damage which underlie this lawsuit for insurance coverage.

Indiana Gas claims that it has incurred and will continue to incur millions of dollars in liabilities as the result of state and federal law requirements to respond to the property damage at and near certain former MGP sites. According to Indiana Gas, damage to groundwater beneath the former MGP sites from subsurface leaching and migration began at most locations prior to 1955 and continues to the present day.

HOME'S MOTION FOR SUMMARY JUDGMENT ON THE POLLUTION EXCLUSION

In support of its motion for summary judgment, Home argues that Indiana Gas is not entitled to coverage under any insurance policy that excludes coverage for pollution absent a "sudden and accidental" discharge, dispersal, escape or release of pollutants. Specifically, the language of the pollution exclusion at issue in this motion reads as follows:

> [T]his policy does not apply to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants orpollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.
>
> Coverage under the policies at issue depends in the first instance on whether the underlying claims are for a discharge or release of pollutants and therefore subject to the pollution exclusion. If the exclusion applies, then coverage depends entirely on whether the "sudden and accidental" exception to the exclusion also applies.

Home first argues that Indiana Gas' claims are based on a release of pollutants, and thus fit within the exclusion. Indiana Gas, however, claims that the term "pollutant" is ambiguous. Indiana Gas further claims that Home bears the burden of establishing that MGP by-products were understood by the parties to be "pollutants" within the meaning of the exclusion at the time the policies containing such exclusions were issued.

Indiana Gas relies on American States Ins. Co. v. Kiger, 662 N.E.2d 945 (Ind.1996), in support of its position that the term "pollutant" is ambiguous and should thus be construed against the insurer. In Kiger, the insured owned a gasoline service station, which was the source of an underground gasoline leak. The insurance policy at issue contained a pollution exclusion clause and defined "pollutants" as:

> any solid, liquid gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

Id. at 948. The Kiger court stated that:

> Clearly, this clause cannot be read literally as it would negate virtually all coverage. For example, if a visitor slips on a grease spill then, since grease is a "chemical" there would be no insurance coverage. Accordingly, this clause requires interpretation. . . . We are particularly troubled by the interpretation offered by American States, as it makes it appear that Kiger was sold a policy that provided no coverage for a large segment of the gas station's business operations. . . . In any event, since the term "pollutant" does not obviously include gasoline and, accordingly is ambiguous, we once again must construe the language against the insurer who drafted it. Appellant claims that in common parlance gasoline is sometimes referred to as a pollutant. That may be correct, but the ambiguity remains. If a garage policy is intended to exclude coverage for damage caused by the leakage of gasoline, the language of the contract must be explicit.

Id. at 948-49.

Indiana Gas argues that like Kiger, the instant case involves releases of substances that are not explicitly listed in the pollution exclusion and that obviously were not considered by Indiana Gas to be "pollutants" until recently when contamination was discovered at the sites. Although the exact harmful chemical substances that were released into the environment are not listed in the pollution exclusion clause, the clause does clearly state that damages arising out of the discharge, etc. of "waste materials" are not covered by the policy. It is clear to this court that the substances which Indiana Gas and its predecessors placed into the environment were "waste products".

Although Indiana Gas attempts to characterize the waste products as "by-products", some of which were marketable in some form, it is clear that even if some of the waste products were eventually marketable, a huge amount of waste products were simply dumped on the ground or buried in pits. Indiana Gas' own experts have testified that such methods of disposing wastes were accepted practices in the first half of this century, and were not associated with potential human health risks. (Report of Dr. Barbara Beck at 6-1; Report of Dr. Richard T. Dewling at 6-7). Clearly, Indiana Gas would not have gone to the expense of procuring extensive reports from two expert witnesses regarding the disposal of waste products if Indiana Gas had not disposed of any such waste products. Thus, as the policies at issue exclude damages arising from "waste products", the exclusion has been triggered.

Home next argues that Indiana Gas' claims are not within the "sudden and accidental" exception to the pollution exclusion. The parties dispute the burden of proof on this issue. Home acknowledges that under Indiana law, insurers bear the burden of proving the applicability of a policy exclusion. However, Home argues that the burden of proof for an exception to a policy exclusion rests with the insured. The positions of both parties are supported by numerous cases, yet the Indiana courts have not spoken on this issue.

The courts in the Seventh Circuit also have not spoken on this precise issue. However, in Gulf Insurance Company v. Tilley, 280 F.Supp. 60 (N.D.Ind.1967), aff'd, 393 F.2d 119 (7th Cir.1968), this court held that a blanket exclusion and the exception thereto must be construed together to give meaning to the entire paragraph of the exclusion. 280 F.Supp. at 64. In the present case, this court holds that the most consistent way to allocate the burden of proof is to follow the traditional distinction between coverage clauses and exclusionary clauses. Because the "sudden and accidental" exception is part of an exclusionary clause, the insurer bears the burden of proving not only that the property damage at issue resulted from the discharge of pollutants, but also that the discharge was neither sudden nor accidental. See New Castle County v. Hartford Acc. and Indem. Co., 933 F.2d 1162, 1182 (3rd Cir.1991).

The next issue before the court is whether the pollution exclusion is inapplicable due to Indiana Gas' alleged lack of knowledge or expectation about the polluting characteristics of the discharge or release. Home has taken the position that if the substances discharged or released into the environment were in fact wastes or pollutants, the pollution exclusion applies without regard to Indiana Gas' awareness of whether the discharges were hazardous, or whether Indiana Gas was even the party who discharged the pollutants. Indiana Gas, however, argues that it did not believe (and had no reason to believe) that it was releasing pollutants into the environment, and the pollution exclusion should not apply for that reason. Indiana Gas also argues that it did not operate gas plants at five of the sites in this case, but acquired those sites only after MGP operations had ceased and, thus, did not discharge or release any by-products or pollutants at those five sites.

The plain language of the pollution exclusion provides that the policy does not apply to damage arising out of *the discharge* of pollutants, unless such discharge is sudden and accidental. It seems completely clear that the only exception to the pollution exclusion is in the case of sudden and accidental discharges. There is simply no exception for intentional discharges that cause unexpected or unintended damages. This reading of the pollution exclusion is supported by ample case law. See e.g., St. Paul Fire & Marine Ins. Co. v. Warwick Dyeing Corp., 26 F.3d 1195, 1200 (1st Cir.1994); New Castle County v. Hartford Accident & Indem. Co., 970 F.2d 1267, 1272 (3d Cir.1992); Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co., 842 F.Supp. 575, 584-85 (D.D.C.1994, aff'd sub nom. Charter Oil Co. v. American Employers' Ins. Co., 69 F.3d 1160 (D.C.Cir.1995); Remington Arms Co. v. Liberty Mut. Ins. Co., 810 F.Supp. 1406, 1411 (D.Del.1992); Bureau of Engraving v. Federal Ins. Co., 793 F.Supp. 209, 212 (D.Minn.1992), aff'd, 5 F.3d 1175, 1177-78 (8th Cir.1993); Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co., 781 F.Supp. 9, 17 (D.D.C.1991), aff'd, 995 F.2d 305 (D.C.Cir.1993).

Indiana Gas again relies on Kiger in support of its interpretation. In Kiger, the Indiana Supreme Court was called upon to determine whether the phrase "sudden and accidental" was ambiguous. The Court stated:

> If one considers the insurance industry's own interpretation of the contractual language, it becomes clear that there exists a lack of clarity (footnote omitted). The ambiguous phrase "sudden and

> accidental" was first added to insurance policies in the early 1970's, in response to a plethora of claims for damage caused by polluting industries. The industry claimed that its addition was a mere clarification. The drafters said that coverage for pollution may not be provided in most cases under present policies because the damages could be said to be expected and intended and thus would be excluded by the definition of occurrence, and, therefore, the adoption of an exclusion could be said to be a clarification, but a necessary one in order to avoid any question of intent.
>
> Minutes of the Industrial Rating Board General Liability Governing Committee (March 17, 1970) (emphasis added) (quoted in Harwood et al., The "Frivolity" of Policyholder Gradual Pollution Discharge Claims, 5 Mealey's Ins.Lit.Rpts. No. 40 (August 1991)). ***In other words, the adding of the "sudden and accidental" language is nothing more than a "clarification" which made explicit the fact that the insurance did not cover those acts which are expected or intended.***

662 N.E.2d at 947-48 (emphasis added).

Although Indiana Gas cites to Kiger and points out that the Indiana Supreme Court relied on the "Minutes of the Insurance Rating Board" (incorrectly referred to in Kiger as the "Industrial Rating Board"), it is clear that Kiger does not support Indiana Gas' argument that its alleged lack of knowledge of the polluting characteristics of its wastes is relevant. Clearly, even after examining the "Minutes" the Indiana Supreme Court stated that the "clarification" made explicit the fact that the insurance did not cover those acts which are expected or intended. The Indiana

Supreme Court did not focus on the word "damages" and did not hold that the damages resulting from an insured's intentional acts must be expected and/or intended. Nor is it likely that the Indiana Supreme Court would ever hold, as Indiana Gas suggests, "that the intent of the exclusion is to exclude only damage resulting from the insured's intentional discharge of a known pollutant." (Response brief at 15). Rather, it is clear that the focus is on the act of discharging wastes and pollutants and not on the damage caused by that act.

Likewise, there is no wording in the policies which suggests that the discharge must have been an act of the insured. The policy does not provide, as it easily could have, that the pollution exclusion does not apply to discharges that are "sudden and accidental from the standpoint of the insured." See, e.g., Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co., 842 F.Supp. 575, 585 n. 15 (D.D.C.1994) (exception for "sudden happenings" not expected or intended "from the standpoint of the insured"), aff'd sub nom. Charter Oil Co. v. American Employers' Ins. Co., 69 F.3d 1160 (D.C.Cir.1995). The exception to the pollution exclusion is only for discharges that are "sudden and accidental", without regard to the identity of the discharger. Quaker State Minit-Lube v. Fireman's Fund Ins. Co., 52 F.3d 1522, 1530-31 (10th Cir.1995); St. Paul Fire & Marine Ins. Co. v. Warwick Dyeing Corp., 26 F.3d 1195, 1201-03 (1st Cir.1994); Northern Ins. Co. v. Aardvark Assocs., Inc., 942 F.2d 189, 194 (3rd Cir.1991); Park-Ohio Indus., Inc. v. Home Indemnity Co., 975 F.2d 1215, 1222 (6th Cir.1992); United States Fidelity & Guar. Co. v. George W. Whitesides Co., 932 F.2d 1169, 1170-71 (6th Cir.1991).

Indiana Gas has directed this court to numerous decisions in which the courts have relied on the drafting history of the exclusion to conclude that it excludes only the insured's intentional discharge of known pollutants. See, e.g., Morton International, Inc. v. General Accident Insurance Co., 134 N.J. 1, 629 A.2d 831 (1993); United States Fidelity & Guar. Co. v. Specialty Coatings Co., 180 Ill.App.3d 378, 129 Ill.Dec. 306, 535 N.E.2d 1071 (1989); Buckeye Union Ins. Co. v. Liberty Solvents & Chems. Co., 17 Ohio App.3d 127, 477 N.E.2d 1227 (1984). Home strongly objects to the holdings of these cases and argues that the "regulatory estoppel" theory adopted by those courts was expressly rejected by the Kiger Court which stated: "We are not adopting this understanding under a doctrine of 'regulatory estoppel' or any other theory." 662 N.E.2d at 948.

Generally, "regulatory estoppel" decisions are criticized for rewriting the terms of insurance contracts. Landis v. American Interinsurance Exch., 542 N.E.2d 1351, 1353 (Ind.App.1989); Mutual Sec. Life Ins. Co. v. Fidelity & Deposit Co. of Md., 659 N.E.2d 1096 (Ind.App.1995); Cincinnati Ins. Co. v. Mallon, 409 N.E.2d 1100, 1103 (Ind.App.1980). See also, Carrier Corp. v. Home Ins. Co., No. CV-88-352393-8 (Conn.Super.Ct. Oct. 31, 1994); E.I. duPont de Nemours & Co. v. Admiral Ins. Co., 1995 WL 562256 1995 Del.Super. LEXIS 398 (Del.Super.Ct. Aug. 23, 1995). As this court is prohibited from rewriting the terms of the contracts at issue, this court is precluded from adding the condition that the pollution exclusion does not apply to discharges that are sudden and accidental "from the standpoint of the insured." Clearly, the pollution exclusion in the contracts at issue applies unless the discharge is "sudden and accidental"; there is no other exception to the pollution exclusion.

Indiana Gas next shifts the focus of its argument to the issue of when has a "discharge" occurred. Indiana Gas claims that, at least with respect to the Shelbyville site, the wastes were placed in containment pits and were not simply dumped on the land. Indiana

Gas argues that the leakage from these containment pits was "sudden and accidental", and thus the exception to the pollution exclusion applies. Indiana Gas cites to Patz v. St. Paul Fire & Marine Ins. Co., 15 F.3d 699 (7th Cir.1994), in support of its argument. In Patz, the plaintiffs (who manufactured and painted farm equipment) encountered the problem of how to dispose of wastes generated as a by-product of painting. One of the wastes was water contaminated by phosphate. The plaintiffs' consultants suggested that the plaintiffs dig an open pit for the water. The idea, well accepted in the waste-disposal community at the time (early 1970s), was that the water would evaporate, leaving a deposit of phosphate solids that would rest at the bottom of the pit and could be easily removed and used as fertilizer. Because the soil where the pit was to be dug was highly compacted clay soil the water was expected to evaporate before it could permeate the soil, and so the soil beneath the pit would not be contaminated. The plaintiffs discontinued use of the pit in 1980 and filled it in the following year. However, in 1986 the Wisconsin Department of Natural Resources conducted an environmental audit which discovered groundwater contamination from the pit. The plaintiffs spent a substantial amount cleaning up the property, and sought to recover this amount from their insurance company.

When the insurance company invoked the pollution exclusion, the plaintiffs argued that the "sudden and accidental" exception applied and that coverage was appropriate. Under controlling Wisconsin law, the phrase "sudden and accidental" means "unintended and unexpected". Just v. Land Reclamation, Ltd., 155 Wis.2d 737, 456 N.W.2d 570 (1990). Further, pursuant to Just, the proper reading of the pollution exclusion clause is to distinguish between an intentional act not intended to discharge wastes into the environment and an intentional discharge. Applying Just to the facts before it, the Seventh Circuit Court of Appeals held in Patz that since the plaintiffs' evaporation pit was a containment structure, despite its lack of artificial materials, the discharge was the leakage from that structure, which leakage was "sudden and accidental in the special sense of unintended and unexpected." 15 F.3d at 704. As "the only discharges were the unintended and unexpected consequences of the defective containers in which the pollutants had been placed", the exception to the pollution exclusion was triggered and the Seventh Circuit affirmed the district court's decision in favor of the plaintiffs.

Home strongly contends that the holding in Patz is not relevant to the present case. Home first points out that the pollution exclusion refers to discharges "into or upon land," not the subsequent migration that causes third- party damage. See, e.g., Broderick Invest. Co. v. Hartford Accident & Indem. Co., 954 F.2d 601, 607-08 (10th Cir.) ("[W]hether BIC intended the waste to seep into the groundwater and cause damage after the initial discharges into the land . . . is irrelevant."); Protective Nat'l Ins. Co. v. City of Woodhaven, 476 N.W.2d 374, 377 ("It is clear that the discharge, dispersal, release, or escape to which both the exclusion and the exception refer is the initial discharge, dispersal, release, or escape into the atmosphere and not the subsequent migration.")

With respect to Indiana Gas' claim that the wastes were disposed of in clay bottomed pits, a natural containment structure, Home contends that the record in this case establishes that the MGP wastes were simply dumped into or upon the land. Indiana Gas' own witness testified that "tars were placed on and in the ground regularly at gas plants." (Stegner Dep. at 177-78). Home further argues that even if Patz is applicable to the present case, Indiana Gas has pointed to the testimony of just one witness (Carl Kinder), who testified about just one of the nine sites at issue, who said that he believed that there was clay beneath the disposal pits at the Shelbyville site. Home points out that Kinder also testified that the discharges into the pits were done before his involvement with the Shelbyville site, and thus Kinder's belief that the clay bottom of the pits prevented migration of the wastes is irrelevant, and is also inadmissible hearsay (as he did not personally know whether the pits had clay bottoms).

This court finds Indiana Gas' reliance on Patz to be misplaced. It is clear that Patz was decided under Wisconsin law, and the Seventh Circuit was bound by the Wisconsin Supreme Court's decision in Just. Indiana Gas has not cited to any case from the Indiana Supreme Court that is analogous to Just. Moreover, it is apparent that the Seventh Circuit was not overly impressed with the Just decision, as the Court stated: "We cannot, of course, overrule Just, but we are not obliged to place the broadest possible interpretation on the decision." 15 F.3d at 704-05. It is also clear that it was the practice at the MGP plants to dump the wastes onto the land, even though some waste may have been dumped into pits. The court further notes that even though Kinder testified that he believed that the pits had clay bottoms, there is no evidence whatsoever that the sides of the pits were made of clay. Thus, even if wastes were placed into clay bottomed pits, the waste would necessarily touch the sides of the pits, which were presumably made of soil. As the waste was placed "upon the land" even when it was placed in pits, the waste was "discharged" at the time it was placed in the pits.

Indiana Gas also claims that Patz is relevant because the MGP wastes "suddenly and accidentally" escaped into the soil and groundwater from various man-made containment structures, e.g., gas holders, oil tanks, tar separators, purifiers and storage tanks. Indiana Gas cites to the Prickett Report in support of its claims. However, as Home notes, the Prickett Report merely identifies areas of soil contamination that are possible sources of groundwater contamination. The Report does not offer an opinion as to how the soil became contaminated, and does not discuss the issue of releases from "man-made" structures.

As the only evidence of record shows that the discharges, etc., were not "sudden and accidental", this court rules that the exception to the pollution exclusion is not applicable. Further, as the pollution exclusion in the policies at issue in this motion is applicable in the instant case, summary judgment will be granted in favor of Home (and all joining defendants) on this issue.

LONDON MARKET INSURERS' MOTION FOR SUMMARY JUDGMENT ON ALL POLICIES CONTAINING THE LONDON MARKET POLLUTION EXCLUSION

The LMI pollution exclusion (NMA 1685) reads as follows:

> This insurance does not cover any liability for:
>
> (1) Personal Injury or Bodily Injury or loss of, damage to, or loss of use of property directly or indirectly caused by seepage, pollution or contamination, provided always that this paragraph (1) shall not apply to liability for Personal Injury or Bodily Injury or loss of or physical damage to or destruction of tangible property, or loss of use of such property damaged or destroyed, where such seepage, pollution or contamination is caused by a sudden, unintended and unexpected happening during the period of this Insurance.
>
> (2) The cost of removing, nullifying or cleaning-up seeping, polluting or contaminating substances unless

> the seepage, pollution or contamination is caused by a sudden, unintended and unexpected happening during the period of this Insurance.
>
> (3) Fines, penalties, punitive or exemplary damages.
>
> This Clause shall not extend this Insurance to cover any liability which would not have been covered under this Insurance had this Clause not been attached.

In support of its motion for summary judgment, LMI argues that its pollution exclusion is clear and unambiguous and should be enforced according to its terms. Specifically, LMI addresses the decision in American States Ins. Co. v. Kiger, 662 N.E.2d 945 (Ind.1996), and argues that the decision does not require this court to find that the exclusion is ambiguous. LMI argues that the Kiger court did not construe the wording of its pollution exclusion, which potentially permits coverage for pollution arising out of happenings in the policy period which are "sudden, unintended and unexpected". LMI acknowledges that the Indiana Supreme Court found the phrase "sudden and accidental" to be ambiguous. 662 N.E.2d at 948. However, LMI argues that Kiger is distinguishable on two grounds.

First LMI argues that it is not a domestic insurer and was not a member of the Insurance Rating Board (incorrectly referred to in Kiger as the "Industrial Rating Board"), the minutes of which were cited by the Kiger Court to support its conclusion that the phrase "sudden and accidental" was ambiguous. Secondly, LMI argues that a construction of "sudden" as meaning "unexpected" would render its pollution exclusion meaningless. That is, the clause would read: "unexpected, unintended and unexpected".

Assuming that Kiger applies, and that the clause (as interpreted in favor of the insured) provides that happenings that are "unexpected, unintended and unexpected" are not excluded, it is clear that the "happenings" at the MGP sites were not unexpected or unintended. That is, the wastes were deliberately placed into and onto the ground. (See supra re: Home's Motion for Partial Summary Judgment on Pollution Exclusion). Thus, even construing the pollution exclusion in favor of Indiana Gas, the pollution exclusion is applicable, as the exception has not been triggered. Consequently, summary judgment will be granted in favor of LMI on this issue.

Conclusion

For all of the foregoing reasons, partial summary judgment is hereby GRANTED in favor of Home (and the joining defendants), and LMI on the issue of the "pollution exclusions".

Appendix B

INDIANA GAS COMPANY, INC., Richmond Gas Corporation
d/b/a Indiana Gas Company, Inc. and Terre Haute Gas
Corporation d/b/a Indiana Gas Company, Inc.,
Plaintiffs,

v.

AETNA CASUALTY & SURETY COMPANY,
Connie Lee Insurance Company, Continental Casualty Company,
Continental Insurance Company, Greenwich Insurance
Company, Home Insurance Company, Certain Underwriters at
Lloyd's London and Certain London Market Insurance
Companies, North River Insurance Company, Ranger Insurance
Company, St. Paul Fire & Marine Insurance Company, St. Paul
Surplus Lines Insurance Company, and the Travelers Company,
Defendants.

No. 1:95-CV-101.

United States District Court,
N.D. Indiana,
Fort Wayne Division.

Oct. 2, 1996.

* * *

MEMORANDUM OF DECISION AND ORDER

WILLIAM C. LEE, District Judge.

This matter is before the Court on the "Motion for Summary Judgment On St. Paul Fire and Marine's Excess Insurance Policies" filed by that defendant on July 10, 1996. Indiana Gas responded to that motion on July 31, 1996 to which St. Paul responded on August 9, 1996. For the following reasons, the motion for summary judgment will be granted.

Summary Judgment Standards

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). However, Rule 56(c) is not a requirement that the moving party negate his opponent's claim. Fitzpatrick v. Catholic Bishop of Chicago, 916 F.2d 1254, 1256 (7th Cir.1990). Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery, against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and in which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). The standard for granting summary judgment mirrors the directed verdict standard under Rule 50(a), which requires the court to grant a directed verdict where there can be but one reasonable conclusion. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). A scintilla of evidence in support of the non-moving party's position is not sufficient to successfully oppose summary judgment; "there must be evidence on which the jury could reasonably find for the plaintiff." Id. at 252, 106 S.Ct. at 2512; In re Matter of Wildman, 859 F.2d 553, 557 (7th Cir.1988); Klein v. Ryan, 847 F.2d 368, 374 (7th Cir.1988); Valentine v. Joliet Township High School District No. 204, 802 F.2d 981, 986 (7th Cir.1986). No genuine issue for trial exists "where the record as a whole could not lead a rational trier of fact to find for the nonmoving party." Juarez v. Ameritech Mobile Communications, Inc., 957 F.2d 317, 322 (7th Cir.1992) (quoting Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986)).

Initially, Rule 56 requires the moving party to inform the court of the basis for the motion, and to identify those portions of the "pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, which demonstrate the absence of a genuine issue of material fact." Celotex, 477 U.S. at 323, 106 S.Ct. at 2553. The non- moving party may oppose the motion with any of the evidentiary materials listed in Rule 56(c), but reliance on the pleadings alone is not sufficient to withstand summary judgment. Goka v. Bobbitt, 862 F.2d 646, 649 (7th Cir.1988); Guenin v. Sendra Corp., 700 F.Supp. 973, 974 (N.D.Ind.1988); Posey v. Skyline Corp., 702 F.2d 102, 105 (7th Cir.), cert. denied, 464 U.S. 960, 104 S.Ct. 392, 78 L.Ed.2d 336 (1983).

So that the district court may readily determine whether there are genuine issues of material fact, under Local Rule 56.1, the moving party is obligated to file with the court a "Statement of Material Facts" supported by appropriate citation to the record to which the moving party contends there is no genuine issue. In addition, the non-movant is obligated to file with the court a "Statement of Genuine Issues" supported by appropriate citation to the record all material facts to which the non-movant contends there are exists a genuine issue necessary to be litigated. See Waldridge v. American Hoechst Corp. et al., 24 F.3d 918 (7th Cir.1994). In ruling on a summary judgment motion the court accepts as true the non-moving party's evidence, draws all legitimate inferences in favor of the non-moving party, and does not weigh the evidence or the credibility of witnesses. Anderson, 477 U.S. at

249-51, 106 S.Ct. at 2511. However, "[i]t is a gratuitous cruelty to parties and their witnesses to put them through the emotional ordeal of a trial when the outcome is foreordained," and in such cases summary judgment is appropriate. Mason v. Continental Illinois Nat'l Bank, 704 F.2d 361, 367 (7th Cir.1983).

Irrelevant or unnecessary facts do not preclude summary judgment even when they are in dispute because the issue of fact must be genuine. Fed.R.Civ.P. 56(c), (e). To establish a genuine issue of fact, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586, 106 S.Ct. at 1356; First National Bank of Cicero v. Lewco Securities Corp., 860 F.2d 1407, 1411 (7th Cir.1988). The non-moving party must come forward with specific facts showing that there is a genuine issue for trial. Id. A summary judgment determination is essentially an inquiry as to "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 251-52, 106 S.Ct. at 2512.

Factual Background

St. Paul issued or allegedly issued excess third party liability policies to Richmond Gas[1] as follows:

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[1] All of the stock of Richmond Gas was transferred to the Indiana Gas Company in 1991 after Richmond Gas was acquired in 1990 by Indiana Gas' parent corporation Indiana Energy Inc.

Appendix B

Policy No.	Excess to:	Dates:
566XC1488[2]	Continental $10 million	8/22/68-10/5/68
566XC2285	Globe $25,000	10/22/68-11/4/69
	SIR $975,000	
566CX8978	Globe $50,000	4/22/70-71
513XA0493	Globe $50,000	4/22/71-72
566XD1990	Globe $50,000	4/22/72-73
513XA5936	Globe $50,000	4/22/73-74
"Unknown"	Globe $50,000	4/22/74-75

Thus, the underlying Globe policy limits beneath the St. Paul policies in effect or allegedly in effect from 4/22/70 to 5/31/75 were $50,000 for each accident or occurrence for non-auto property damage for each year of coverage. Plaintiffs have alleged that there are $1 million in underlying limits beneath St. Paul policy number 566XC2285, consisting of $25,000 in Globe policy limits and $975,000 of Richmond Gas' own SIRs[3] for the period from 10/22/68 to 4/11/70.

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[2] In footnote one to its answer brief, Indiana Gas indicated that it was withdrawing its claim for coverage for this loss under this policy.

[3] The acronym "SIRs" stands for self insured retentions.

Appendix B

All of these policies contained language substantial similar to the following contained in St. Paul excess policy number 566XC1488:

Insuring Agreement

> In consideration of the payment of premiums stated in the Declarations the St. Paul Fire and Marine Insurance Company, herein called the Company, agrees to indemnify the insured, in accordance with the applicable insuring agreements of the primary insurance against loss subject to the limits stated in Item 5, Section I of the Declarations and as fully and to all intents and purposes as though the primary insurance had been issued for the limits set forth in Item 5, Section III of the Declarations. This policy shall apply only to coverages for which an amount is indicated in Item 5, Section I and then only in excess of the corresponding amount as indicated in Item 5, Section II of the Declarations.

Definitions

> 1. Loss. The word "loss" shall be understood to mean the sums paid in settlement of losses for which the Insured is liable after making deductions for all other recoveries, salvage and other insurance (other than recoveries under the policy(ies) of the primary insurer), whether recoverable or not, and shall exclude all expenses and costs.
>
> 2. Costs. The word "costs" shall be understood to mean interest on judgments, investigations, adjustment and legal expenses (excluding, however, all expenses for

> salaried employees and retained counsel of and all office expenses of the insured).

Plaintiffs have settled their claims with the primary carriers for an undisclosed amount. As of the date that the complaint was filed in this cause, Indiana Gas had been billed and paid over $47,500 in investigation costs relating to the Richmond site and that sum has climbed to more than $55,000. It has been estimated that it will costs in excess of $1 million in investigation, response and removal expenses for the Richmond site.

Application of Law

St. Paul has moved for summary judgment on the grounds that the primary policies and self insured retentions underlying its excess policies have not been exhausted and further because Indiana Gas has not established that they paid or will pay any third party liability claims for damages at the Richmond site. In response, Indiana Gas asserts that its settlements with the primary carriers are completely irrelevant to St. Paul's coverage obligations since the excess policies require only that the liabilities exceed the limits of the primary policies underlying the excess policies. As for St. Paul's argument that it has not established that it will pay any third claims for damages, Indiana Gas asserts that it has shown "probabilistic" injury. Those arguments will be considered in turn.

Some courts have held that a plaintiff who settles with the primary insurer for less than the primary policy limits reserves the right to pursue an action to the extent of the excess policy limits. See, Kent D. Syverud, The Duty To Settle, 76 Va.L.Rev. 1113, 1209 (1990) (collecting cases). Other courts have reached an opposite conclusion. See, William M. Savino, Excess and Extended Coverages and Excess Coverage Issue, 539 PLI/LIT 445, 452-54 (1995) (collecting cases).

In the present matter, Indiana Gas argues that an excess insurer is obligated to its insured for losses in excess of the limits of any underlying primary policy regardless of whether the insured actually collects from the primary carrier the full amount of the primary policy and in support of that position relies primarily on the decision of the Second Circuit in Zeig v. Massachusetts Bonding & Ins. Co., 23 F.2d 665 (2nd Cir.1928). There, Judge Augustus N. Hand wrote that "the excess insurer has no rational interest in whether the insured collected the full amount of the primary policies, so long as it was only called upon to pay such portion of the loss as was in excess of the limits of the policies." Id. at p. 666.

While Judge Hand was of the view that the "excess insurer has no rational interest in whether the insured collected the full amount of the primary policy," the Seventh Circuit in United States Fire Ins. Co. v. Lay, 577 F.2d 421, 423 (7th Cir.1978) did "conceive of good reasons for an excess carrier to be unwilling to accept liability unless the amount of the primary policy has actually been paid." This is so because, "[a] settlement for less than the primary limit that imposed liability on the excess carrier would remove the incentive of the primary insurer to defend in good faith or to discharge its duty . . . to represent the interests of the excess carrier." Id. See also Ryder Truck Lines v. Carolina Cas. Ins. Co., 270 Ind. 315, 385 N.E.2d 449, 452 (1979) ("the liability of the insurer under an excess insurance clause arises only after the limits of the primary policy are exhausted").

In light of Lay, this Court holds that the primary insurer's limits must be exhausted before excess insurers are liable. Since Indiana Gas does not dispute that the primary limits have not been paid, St. Paul's motion for summary judgment will be granted.[4] This is in keeping with the notion that a policy "is excess if [the policyholder's] right is contingent on his having exhausted the limits of his other insurance." Rhone-Poulenc Inc. v. International Ins. Co., 71 F.3d 1299, 1301 (7th Cir. 1995).

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[4] Indiana Gas also argues that the policy is ambiguous because it states that coverages apply "in excess of the corresponding amount

(Cont'd)

Yet even if the foregoing is incorrect and Indiana Gas could properly settle for under the policy limits of its primary insurance and still pursue its excess carrier, there is but another reason why defendant's motion for summary judgment should be granted. This is so because, as discussed more fully in this Court's Memorandum of Decision and Order granting the motion to dismiss filed by defendant St. Paul Fire & Marine Insurance and others,[5] plaintiffs have failed to show a justiciable controversy with respect to the Richmond site. The existence of a case or controversy is a prerequisite to all federal actions, including those for injunctive and declaratory relief. Skelly Oil Co. v. Phillips Petroleum, 339 U.S. 667, 671-72, 70 S.Ct. 876, 878-9, 94 L.Ed. 1194 (1950).[6]

(Cont'd)

indicated in Item 5" (the amount of the limits of the underlying policy) and does not state that the underlying carriers must actually pay the entire limits of the underlying policies before the excess policies apply. This Court is of the view that the language is not ambiguous. In fact, it is similar to that at issue in Lay which, so far as relevant, provided: "the Company agrees to indemnify the insured for ultimate net loss in excess of the retained limit hereinafter stated, which the insured may sustain by reason of the liability imposed upon the insured by law, or assumed by the insured under contract." 577 F.2d at 422.

[5] That order is issued contemporaneously herewith. See 946 F.Supp. 627.

[6] "[A] justiciable controversy is . . . distinguished from a difference or dispute of a hypothetical or abstract character; [or] from one that is academic or moot." Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41, 57 S.Ct. 461, 464, 81 L.Ed. 617 (1937). "The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests." Id.

In the present matter, at the time the suit was filed no third party had made any claim or filed any litigation regarding the Richmond site; neither the state environmental agency nor the EPA had issued any notice or order or threatened any claim regarding that site; and it is not clear whether either the state or federal government would ever require a clean-up since no notices, orders, claims, litigation or directives have been issued regarding the site. Given those facts, this case is akin to the Eleventh Circuit's decision in Atlanta Gas & Light v. Aetna, 68 F.3d 409 (11th Cir.1995) and the Eighth Circuit's decision in Gopher Oil Company v. Bunker, 84 F.3d 1047 (8th Cir.1996).

True, as pointed out by plaintiffs in opposition to this motion (and in opposition to the motion to dismiss), the Seventh Circuit's in Bankers Trust Co. v. Old Republic Ins. Co., 959 F.2d 677, 681 (7th Cir.1992) indicated that "Article III requires only a probabilistic injury." However, as pointed out in this Court's decision granting St. Paul's motion to dismiss, Bankers Trust also indicated that the "probabilistic injury" is a "matter of degree." Id. In Bankers Trust, the insured had in fact been sued by a third party before the declaratory judgment action regarding coverage was brought and the only remaining questions were whether the insured would win or lose the suit and the amount of the judgment. Here, unlike Bankers Trust, but like Atlanta Gas, there has been no suit filed against Indiana Gas and no indication or notice that that will occur with respect to the Richmond site. For this reason also therefore, summary judgment will be granted.

Conclusion

On the basis of the foregoing, defendant St. Paul Fire and Marine Insurance Company's July 10, 1996, "Motion for Summary Judgment On St. Paul Fire and Marine's Excess Insurance Policies" is GRANTED.

SO ORDERED.

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DECIDED MAY 13, 1998

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 97-1328 & 97-1381

INDIANA GAS COMPANY, INC., *et al.*,

Plaintiffs-Appellants,

v.

HOME INSURANCE COMPANY, *et al.*,

Defendants-Appellees.

On Petition for Rehearing

DECIDED MAY 13, 1998

Before POSNER, *Chief Judge*, and EASTERBROOK and EVANS, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Our opinion in this case concludes that underwriting syndicates at Lloyd's of London must be treated like limited partnerships for purposes of determining their citizenship when jurisdiction depends on 28 U.S.C. §1332. This means that each syndicate has the citizenship of each participating "name". Because at least one name in one of the defendant syndicates was domiciled in Indiana when the case began, the complete diversity essential to jurisdiction under §1332 was missing. The London Market Insurers, alone among the many parties to the case, have filed a petition for rehearing. The London Market Insurers now advance an argument omitted from the jurisdictional memorandum submitted before our initial decision: that, as unincorporated associations, the underwriting syndicates could be sued as defendant classes under Fed. R. Civ. P. 23.2, with the names' citizenships ignored. An argument made for the first time in a petition for rehearing has been forfeited, and the London Market Insurers confront the further problem that the complaint did not use Rule 23.2. Plaintiffs have several ways to bring partnerships and other unincorporated associations into litigation—such as suing the entity in its own name, suing every partner or member, suing one member of the association as representative of the others, and suing one partner as an individual while allowing that partner to seek indemnity from others. The choice of device may affect "service of process, venue, subject matter jurisdiction, and the enforceability of the judgment." Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, 7C *Federal Practice and Procedure* §1861 at 215 (2d ed. 1986). Rule 23.2 was not used in this case, and that is that.

Lest this invite another round of litigation in which Indiana Gas tries out Rule 23.2, we add that the London Market Insurers are mistaken in thinking that the Supreme Court's cases treating unincorporated associations as citizens of every state of which any member is a citizen may be avoided by suing one partner or member as a "representative" of the rest. The complete-diversity requirement cannot be transmuted into a minimal-diversity requirement so easily. Recall that the names are not parties in the first place. This *is* representative litigation. Indiana Gas correctly concluded that Fed. R. Civ. P. 17(b) permits suit against the syndicates through their lead underwriters, because the law of the United Kingdom permits the lead underwriters to represent the other names' interests—indeed, English law forbids suits by insureds directly against the names. Thus we had to decide what citizenship(s) should be attributed to the lead underwriters or other representatives of the syndicates. These representatives would have the same citizenships whether Rule 17(b) or Rule 23.2 was invoked. See also *Northern Trust Co. v. Bunge Corp.*, 899 F.2d 591 (7th Cir. 1990).

According to the London Market Insurers, "Fed. R. Civ. P. 23.2 provides a jurisdictional basis for this action." Yet how can a rule of procedure expand the subject-matter jurisdiction of the federal courts? Rule 82, which the London Market Insurers do not mention, is emphatic that it cannot: "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein." *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921), on which the London Market Insurers rely, does not imbue Rule 23.2 with jurisdictional consequences. The Court held in *Cauble* that if there is complete diversity between named class representatives and the adverse parties, the district court may adjudicate the rights of other class members under its supplemental jurisdiction. In this sense the citizenship of class members who are not parties is irrelevant. *Cauble* deals with a situation in which the parties have independent claims, which could be fully resolved if other persons similarly situated were unaffected by the case. When the litigant comes to court *only* as a representative, without claims of his own, then it is essential to know what citizenship(s) this person has as representative. Otherwise all of the rules discussed in our initial opinion would collapse. Suppose a big Chicago law firm wanted to sue its landlord, a real estate partnership, under the diversity jurisdiction. A partner of the law firm who is a citizen of Indiana would sue as "representative" of the firm under Rule 23, naming a partner of the real estate syndicate who lives in Illinois as "representative" under Rule 23.2, and ask the judge to ignore the citizenships of the other partners on both sides. Yet that could not be described as a use of the supplemental jurisdiction: the only claim would be a representative one, on which complete diversity could not be established. Just so with suits by and against unincorporated insurance syndicates. Indiana Gas does not have claims against the lead underwriters, to which claims against names might be appended using 28 U.S.C. §1367. It has claims against the underwriters of the policies of insurance, which is to say the syndicates as entities. So Rule 23.2 and *Cauble* are irrelevant, and the petition for rehearing is denied.

Circuit Judge Evans votes to deny the petition for rehearing but does not join this opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX D — EXCERPTS FROM COMPLAINT AND AMENDED ANSWER TO COMPLAINT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA IN *INDIANA GAS COMPANY, INC., et al. v. AETNA CASUALTY & SURETY COMPANY, et al.* FILED APRIL 14, 1995

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

Civil Action No. ________

INDIANA GAS COMPANY, INC., RICHMOND GAS CORPORATION d/b/a INDIANA GAS COMPANY, INC., and TERRE HAUTE GAS CORPORATION d/b/a INDIANA GAS COMPANY, INC.,

Plaintiffs,

v.

AETNA CASUALTY & SURETY COMPANY, AMERICAN HOME ASSURANCE COMPANY, CENTENNIAL INSURANCE COMPANY, CONNIE LEE INSURANCE COMPANY, CONTINENTAL CASUALTY COMPANY, CONTINENTAL INSURANCE COMPANY, GREENWICH INSURANCE COMPANY, HOME INSURANCE COMPANY, LEXINGTON INSURANCE COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, CERTAIN UNDERWRITERS AT LLOYD'S, LONDON and CERTAIN LONDON MARKET INSURANCE COMPANIES, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, NORTH RIVER INSURANCE COMPANY, RANGER INSURANCE COMPANY, ROYAL-GLOBE INSURANCE COMPANIES, ST. PAUL

FIRE & MARINE INSURANCE COMPANY, AND THE TRAVELERS COMPANY,

Defendants.

COMPLAINT FOR BREACH OF CONTRACT, DECLARATORY JUDGMENT AND OTHER RELIEF

INTRODUCTORY STATEMENT

1. This is an action for breach of contract, for declaratory judgment, and for other relief by INDIANA GAS COMPANY, INC., an Indiana public utility local gas distribution company, and its wholly-owned subsidiaries RICHMOND GAS CORPORATION and TERRE HAUTE GAS CORPORATION (collectively "plaintiff"). Each of the defendant insurers sold general liability insurance policies covering plaintiff as described below. Plaintiff seeks relief for defendants' breaches of their contractual obligations under these policies and an order directing defendants to fulfill their obligations to defend and/or indemnify plaintiff for legal liabilities and obligations incurred by it.

2. This action arises as a result of alleged property damage and/or personal injury at and around nine (9) sites where manufactured gas plants operated for various periods of time between approximately 1850 and 1950, as set forth in more detail below.

3. An actual controversy exists between plaintiff and each of the defendants regarding the defendants' obligations under certain insurance policies to defend and/or indemnify plaintiff for legal liabilities and obligations incurred by plaintiff.

Appendix D

IDENTITY OF PARTIES

4. Indiana Gas Company, Inc. is an Indiana corporation with its principal place of business located at 1630 N. Meridian Street, Indianapolis, Indiana. Indiana Gas does business in Indiana, is regulated by, among others, the Indiana Utility Regulatory Commission, and derives the majority of its revenues from within Indiana.

5. Indiana Gas Company, Inc. was incorporated in Indiana in 1945 under the name of Indiana Gas & Water Company, Inc. ("IGWC"). Indiana Gas Company, Inc. and IGWC are hereinafter referred to collectively as "Indiana Gas."

6. In 1945, at the time of its incorporation, IGWC acquired certain assets of Public Service Co. of Indiana ("PSI"), now known as PSI Energy, Inc., associated with the distribution of gas and water, including various manufactured gas plant sites. For the most part, PSI retained assets associated with the production and distribution of electricity. Because some parcels were used for the production and distribution of both gas and electricity, the ownership of such parcels was split between IGWC and PSI as a result of the 1945 transaction.

7. In 1965, IGWC acquired a small gas distribution company located in Madison, Indiana and known as Natural Gas Service, Inc. Natural Gas Service, Inc. had formerly been known as Madison Utilities Corp. Natural Gas Service, Inc. was merged into and became a part of IGWC shortly after its acquisition.

8. In 1967, following the sale and divestiture of its water properties, IGWC changed its name to Indiana Gas Company, Inc.

9. In 1973, Indiana Gas acquired all of the issued and outstanding stock of Central Indiana Gas Company, Inc. ("Central") from American Natural Gas Company. American Natural Gas Company was formerly known as American Light & Traction Corporation. In 1976, all of the properties, plants, assets and business of Central were transferred to Indiana Gas pursuant to a plan of complete liquidation and voluntary dissolution of Central.

10. In 1990, Indiana Energy, Inc. ("Indiana Energy"), Indiana Gas' parent, consummated the acquisition of Richmond Gas Corporation ("Richmond Gas"). In 1991, Indiana Energy transferred the stock of Richmond Gas to Indiana Gas and then effected an operational merger of Richmond Gas with Indiana Gas. As a result, Richmond Gas now conducts business under the name "Indiana Gas Company, Inc."

11. In 1990, Indiana Energy also consummated the acquisition of Terre Haute Gas Corporation ("Terre Haute Gas") from Indiana Gas & Chemical Corp. In 1991, Indiana Energy transferred the stock of Terre Haute Gas to Indiana Gas and then effected an operational merger of Terre Haute Gas with Indiana Gas. As a result, Terre Haute Gas now conducts business under the name "Indiana Gas Company, Inc."

12. Defendants, or their predecessors-in-interest, are, and at all times relevant hereto were, engaged in the business of selling primary and/or excess general liability insurance. From at least 1950 through 1985, defendants, or their predecessors-in-interest, in consideration of substantial premiums paid by or on behalf of Indiana Gas, Central, Richmond Gas and Terre Haute Gas (collectively "IGC") issued primary and/or excess general liability insurance policies under which Indiana Gas, Central, Richmond

Gas and/or Terre Haute Gas were named insureds (herein collectively referred to as "policies sold to IGC"). The named insured, name of the defendant insurer, the policy numbers, the effective dates of such policies and the sites for which coverage is sought under each of the policies sold to IGC are listed in the attached Exhibit A.

13. Some of the policies sold to IGC by defendants were "master" general liability insurance policies issued to Stone & Webster Management Consultants, Inc., ("Stone & Webster") or Ebasco, Inc. ("Ebasco"). Under the Stone & Webster and Ebasco insurance programs, the master policies provided general liability insurance coverage to several other utility companies named as insureds in the insurance policy so that the operative provisions of the "group" insurance contract are identical as to each of the named insureds, although the limits of liability, premiums and effective dates may differ.

14. Defendant Aetna Casualty & Surety Company ("Aetna") is a corporation organized under the laws of Connecticut with its principal place of business located in Hartford, Connecticut.

15. Defendant American Home Assurance Company ("American Home") is a corporation organized under the laws of New Hampshire with its principal place of business located in New York, New York.

16. Defendant Centennial Insurance Company ("Centennial") is a corporation organized under the laws of New York with its principal place of business located in New York, New York.

17. Defendant Connie Lee Insurance Company ("Connie Lee") is a corporation organized under the laws of Wisconsin

with is principal place of business located in Washington, D.C. On information and belief, Connie Lee is a successor-in-interest to Sentry Indemnity Company.

18. Defendant Continental Casualty Company ("Continental Casualty") is a corporation organized under the laws of Illinois with its principal place of business located in Chicago, Illinois.

19. Defendant Continental Insurance Company ("Continental") is a corporation organized under the laws of New Hampshire with its principal place of business located in Concord, New Hampshire. On information and belief, Continental has assumed obligations under certain policies sold to IGC and issued by Harbor Insurance Company.

20. Defendant Greenwich Insurance Company ("Greenwich"), formerly doing business as Harbor Insurance Company, is a corporation organized under the laws of California with its principal place of business located in Greenwich, Connecticut.

21. Defendant Home Insurance Company ('Home") is a corporation organized under the laws of New Hampshire with its principal place of business located in New York, New York.

22. Defendant Lexington Insurance Company ("Lexington") is a corporation organized under the laws of Delaware with its principal place of business located in Boston, Massachusetts.

23. Defendant Liberty Mutual Insurance Company ("Liberty Mutual") is a corporation organized under the laws of Massachusetts with its principal place of business located in Boston, Massachusetts.

24. Upon information and belief, defendant Certain Underwriters at Lloyd's, London ("Lloyd's") is comprised of certain syndicates which are located in and have their principal place of business in London, England.

25. Upon information and belief, defendants Certain London Market Insurance Companies ("London Market Companies") are corporations, all or most of which are organized under the laws of the United Kingdom. Upon information and belief, none of the London Market Companies has its principal place of business in Indiana or is incorporated in Indiana.

26. Upon information and belief, in certain policies sold to IGC and subscribed by Lloyd's and London Market Companies (collectively "London Market Insurers"), the London Market Insurers agreed to submit, at the request of the insured, to the jurisdiction of any court of competent jurisdiction within the United States, and to comply with all requirements necessary to give jurisdiction to such court.

* * *

Appendix D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA

Civil Action
1:95 CV 101

INDIANA GAS COMPANY, ET AL.,

Plaintiff,

v.

AETNA CASUALTY & SURETY COMPANY, et al.,

Defendants.

LONDON MARKET INSURERS' AMENDED ANSWER (AS OF RIGHT) TO THE COMPLAINT

Those Certain Underwriters at Lloyd's, London, parties herein, and defendants Certain London Market Insurance Companies (said companies are and to be more particularly identified on Exhibit B hereto), who or which severally subscribed, each for his or its own proportionate share and not one for the other, only those certain policies of excess liability insurance which have been located and which are identified on Exhibit A attached hereto (said Certain Underwriters and London Market Insurance Companies being collectively referred to hereinafter as "LONDON MARKET INSURERS"), as and for their answer to Plaintiffs' Complaint, state that they answer for themselves and not on behalf of any other defendant or party mentioned or described in the allegations of said Complaint, and do further state as follows:

Appendix D

1. London Market Insurers admit that plaintiff purports to bring an action for declaratory and monetary relief. The policies subscribed by London Market Insurers and at issue herein speak for themselves, and any contrary or inconsistent allegation contained in paragraph 1 of the Complaint is denied. The Complaint speaks for itself and the characterization of the relief sought does not otherwise require an answer.

2. The Complaint speaks for itself and the characterization of the alleged cause of action does not otherwise require an answer. Insofar as an answer is required, London Market Insurers deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 2 of the Complaint.

3. London Market Insurers leave the plaintiffs to their proof that an actual controversy exists, but deny, based upon present information and belief, that the policies subscribed by London Market Insurers contain any duty to defend or any present duty to indemnify under the facts as pleaded in the Complaint.

4-11. London Market Insurers deny knowledge or information sufficient to form a belief as to the allegations of corporate history set forth in paragraphs 4-11 of the Complaint.

12. Insofar as the allegations are directed at London Market Insurers, they deny they were engaged in "selling" insurance, but admit that those Certain Underwriters at Lloyd's, London and those Certain London Market Insurance Companies (which companies are identified or to be more particularly identified on Exhibit B) severally subscribed, each in his or its own proportionate share, and not one for the other, the policies of excess liability insurance listed in Exhibit A hereto. Insofar as the allegations of the paragraph concern the policy numbers or the

effective dates of the policies set forth in Exhibit A to the Complaint or allege that the policies listed therein were subscribed in favor of a particular named assured, London Market Insurers state that, based on present information and belief, certain of the policy information listed on Exhibit A to the Complaint coincides with information possessed by London Market Insurers, while other information does not. London Market Insurers specifically deny that Central Indiana Gas was a named assured on policy K20598. Insofar as paragraph 12 alleges that the policies placed at issue provide coverage for a particular site or sites, London Market Insurers deny information and belief sufficient to form a belief as to the truth of the allegation. Insofar as the paragraph alleges that London Market Insurers received, in exchange for subscribing policies of insurance, "substantial" premiums, London Market Insurers admit, on information and belief, that premiums were received for some or all of the policies listed on Exhibit A hereto, but decline to otherwise characterize those premiums. To the extent an answer may be required, London Market Insurers deny the characterization of those premiums as "substantial". London Market Insurers deny knowledge or information sufficient to form a belief as to the truth of the balance of the paragraph.

13. Insofar as the allegations are directed at London Market Insurers, they deny they were engaged in "selling" insurance, but admit that those Certain Underwriters at Lloyd's, London and those Certain London Market Insurance Companies (which companies are identified or are to be more particularly identified on Exhibit B) severally subscribed, each in his or its own proportionate share and not one for the other, the policies of excess liability insurance listed in Exhibit A hereto. London Market Insurers, on information and belief, deny that certain policies they subscribed as listed in Exhibit A hereto were caused to be subscribed in favor of Stone & Webster Management Consultants,

Inc. or Ebasco, Inc., but admit that certain policies were caused to be placed in the London Insurance Market by entities related to those non-parties. London Market Insurers further deny the allegations to the extent they suggest or imply that the Stone & Webster or Ebasco insurance programs did not provide insurance coverage other than for excess general liability, that assureds under the Stone & Webster or Ebasco programs were required to participate in a particular line or section of coverage afforded, or that the terms, conditions, and exclusions from coverage could not be varied from assured to assured by way of separate endorsement, addendum or otherwise. As to the balance of paragraph 13, London Market Insurers deny knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

14-23. These paragraphs are not directed at London Market Insurers and they therefore decline to plead. Insofar as an answer may be required, London Market Insurers deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraphs 14-23 of the Complaint.

24-26. London Market Insurers admit that those Certain and identified Underwriters at Lloyd's London who subscribed those policies of excess liability insurance set forth in Exhibit A are individuals who are members of various Syndicates which are located in and have their principal place of business of London, England; admit that those Certain London Market Insurance Companies as identified on Exhibit B are corporations, all or most of which are organized under the laws of the United Kingdom; deny that London Market Insurers "sold" insurance coverage, but admit that they severally subscribed, each in his or its own proportionate share and not one for the other, those policies of insurance identified in Exhibit A hereto; deny knowledge or information at this point sufficient to admit or deny as to whether policies of excess liability insurance referenced in Exhibit C were subscribed in favor of the plaintiffs, and similarly deny knowledge or information sufficient to form a belief at this point as to the identity of those insurers who or which may have subscribed coverage in favor of plaintiffs as to such policies of excess liability referenced in Exhibit C; admit that none of the identified London Market Insurance Companies has its principal business in Indiana or is incorporated in Indiana, and admit that, pursuant to the policies of insurance set forth in Exhibit A to this Answer, such London Market Insurers identified as having subscribed thereto have agreed to submit to the *in personam* jurisdiction of this Court. As to the balance of paragraphs 24-26, London Market Insurers deny knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

* * *

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN *INDIANA GAS COMPANY, INC., et al. v. HOME INSURANCE COMPANY, et al.* DATED JANUARY 6, 1998

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 6, 1998

Before

Hon. RICHARD A. POSNER, Chief Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. TERENCE T. EVANS, Circuit Judge

Nos. 97-1328 & 97-1381

INDIANA GAS COMPANY, INC., *et al.*,

Plaintiffs-Appellants,

v.

HOME INSURANCE COMPANY, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, Ft. Wayne Division.

Appendix E

No. 1:95cv101

William C. Lee, *Chief Judge.*

Order

In light of the questions raised at oral argument concerning the citizenship of the London Underwriters, the court now invites the parties to amend their pleadings under 28 U.S.C. §1653 to show all necessary details about the underwriters' citizenship, and to file memoranda discussing the significance of these details.

Any amended pleadings should show the citizenship of each underwriter as of the date the suit was filed (the critical time for purposes of jurisdiction under 28 U.S.C. §1332). Plaintiffs also may use this amendment as the opportunity to exercise (or decline to exercise) their option under *Newman Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989), to dismiss the London Underwriters as defendants. The memoranda should address any issues that the parties deem appropriate, but at a minimum should cover the question whether the syndicates are best treated as partnerships, on which see *Carden v. Akroma Associates*, 494 U.S. 185 (1990), and *Guaranty National Title Co. v. J.E.G. Associates*, 101 F.3d 57 (7th Cir. 1996)) or as business trusts, see *Navarro Savings Ass'n v. Lee*, 446 U.S. 458 (1980).

The necessary documents should be filed by January 27, 1998, and the memoranda should not exceed 15 pages.

APPENDIX F — EXCERPTS FROM OPINIONS IN *EDINBURGH ASSURANCE CO., et al. v. R.L. BURNS CORP., et al.* DATED AUGUST 30, 1979 AND *PETER GEORGE HOOLE LOWSLEY-WILLIAMS, et al. v. NORTH RIVER INSURANCE COMPANY, et al.* DATED MAY 3, 1995

EDINBURGH ASSURANCE COMPANY,
New India Assurance Co.,
Ltd., Plaintiffs,

v.

R. L. BURNS CORP., and American Pacific
International, Inc., Defendants.

No. CV 76-1737-DWW.

United States District Court,
C. D. California.

Aug. 30, 1979

* * *

The London Insurance Market

The parties have contested whether Emett & Chandler in Los Angeles and Hogg Robinson in London were agents of the insurers or the insured for various purposes, viz., issuance and delivery of the policies, and the inclusion of a service of suit clause. This court must also examine the contract formation process to ascertain the intent of the parties as to the scope of coverage. These questions require examination of the custom and practice of the unique insurance market at Lloyd's of London and the London insurance market generally.

Appendix F

Lloyd's was originally an association of underwriters in London with a management committee. It was incorporated in 1871 by an Act of Parliament. The Corporation of Lloyd's provides a physical site for the sale of insurance by underwriters that are members of the Corporation, together with support and incidental services to member underwriters. Lloyd's corporate committee, elected by members from among their number, administers matters of common interest to members. For example, the committee manages the affairs of the corporation, maintains the premises where insurance is sold and the facilities there. It directs accountancy, intelligence and newspaper services. An office under its direction prepares individual insurance policies based upon the terms upon which insurers and insured contract. Another office handles policy claims evaluations referred to it. Yet another office examines the credentials of insurance brokers who seek the right to place insurance at Lloyd's.

The Corporation of Lloyd's never sells insurance itself and is not at risk on the insurance sold on the floor at Lloyd's. Rather, the underwriter members subscribe to cover all or part of a proposed placement of insurance, at their own election. Numbers of individual underwriters, many in England but others scattered throughout the world, have joined together to form syndicates. Syndicates may have anywhere from two or three to hundreds of members. The individual members are known as the "names" on that syndicate. These syndicates are the entities which subscribe on behalf of their members to cover risks and percentage parts of risks. The actual potential liability of a given name depends upon his percentage share of the syndicate of which he is a member, as well as the percentage of the risk to which his syndicate has subscribed.

Purchase and sale of insurance takes place on the floor of the underwriting room at Lloyd's and also in the offices of individual insurance companies in London. The underwriting market at Lloyd's consists of the syndicates; a syndicate or group of syndicates is in turn managed by an underwriting agency. An underwriting agency employs a management staff, and maintains a box on the floor at Lloyd's with a representative. This representative is an underwriter, who evaluates, negotiates, and decides on proposed placements of insurance brought by brokers for the consideration of the syndicate or syndicates he represents. The underwriting agent contracts for the liability of his syndicate or syndicates, and assumes no risk himself except insofar as he is a name himself on the syndicate.

The recognized custom and usage of the London insurance market is that the broker is the agent of the potential assured for most purposes, including the placement of insurance. The potential assured is recognized as the broker's client. The recognized role of the broker is to obtain the best possible terms and quotation he can from the market for his client. In addition, the brokers in the London insurance market generally serve as coordinators of all parts of the insurance, negotiation, placement, claims presentation, and sometimes payment. Only brokers who have been approved by the Committee of Lloyd's are permitted to place risks with Lloyd's underwriters. Such brokers are known as "Lloyd's brokers." Because an applicant for insurance from Lloyd's must act through a Lloyd's broker, there will often be at least one other broker in the picture. An applicant for insurance may deal with an outside broker not a Lloyd's broker, who then must contact a Lloyd's broker. In the instant case, the applicant API used the services of Emett & Chandler in Los Angeles to arrange the insurance transaction through Hogg Robinson, a Lloyd's broker in London.

The underwriter agent, or underwriter, sits at his box on the floor waiting for brokers to approach him with possible insurance risks. The broker provides for the underwriter's consideration a document known as a broker's slip, which contains the details of the risk which the broker is trying to insure. The broker negotiates with the underwriter to obtain the latter's agreement to both the insurance terms and the rate of premium. The underwriter who structures the transaction with the broker and settles on terms becomes known as the lead underwriter. The lead underwriter's syndicate is called the market lead or leader of the market for that particular risk. The lead underwriter then subscribes his syndicate to a particular percentage of the risk, for example, five percent. The underwriter places his initials on the broker's slip together with the particular percentage to which he is subscribing. By placing his initials on the slip, the underwriter considers that he has created an insurance contract between the individual members of the syndicate and the insured.[2]

The broker, having obtained the agreement of one underwriter to terms and premium, as well as a subscription to a percentage of the risk, retains the slip and approaches other syndicates or insurance companies both on the floor at Lloyd's and in the outside offices of insurance companies. The broker presents the slip to them for them to consider whether they desire to subscribe to the agreement as constituted between the broker and the lead underwriter. Each subsequent underwriter may express no interest, may agree to the terms on the same premium rate, require a higher premium rate, or require different terms. In the last two cases, underwriters who had already subscribed would be informed of new terms and their obligations normally amended to conform.

---

[2] A broker may negotiate the terms and premium with a company underwriter initially, and in such an event an insurance company is the market lead. The market sometimes recognizes both a lead underwriter at Lloyd's and a lead company underwriter. The broker, in any event, may circulate the slip among both Lloyd's syndicates and insurance companies until the risk is fully subscribed.

In any event, the underwriter who agrees to subscribe his syndicate places his syndicate initials and the percentage of risk he desires to cover on the slip, and the broker moves on to other underwriters. In this manner the broker moves around the insurance market, both at Lloyd's and among the insurance companies, until he has obtained underwriters' commitments subscribing to one hundred percent of the risk on the slip. At that stage, the broker can confirm to the applicant for insurance or his contact with the applicant that the risk is fully subscribed, or "completed."

Once the broker has succeeded in completing the slip, that is, has obtained one hundred percent coverage, he retains the slip and returns it to his office. Participating underwriters on the risk receive a copy of that part of the slip containing terms and conditions for their files. From the information on the slip, the broker's policy department prepares the policy, using the appropriate printed forms and completing them with the appropriate terms and conditions from the slip. The completed policy and slip are then forwarded to the Lloyd's Policy Signing Office, and if companies' members of the Institute of London Underwriters are involved, to the Institute's Policy Department. Both the Lloyd's office and the Policy Department check the policy against the information on the slip to ensure that the policy reflects the terms and conditions on the slip. At these offices as well a list of the syndicates or companies at risk, compiled pursuant to the slip, is appended. Marine insurance policies are generally issued with a significant time lag after the signing of the slip. In order for an insured to have some evidence of the insurance placed during the period after the slip is completed but before the policy is issued, brokers may furnish the insured with a cover note memorializing the fact of insurance. Brokers consider the cover note a contract between them and the insured indicating that they have placed the insurance.

The broker also has responsibilities in the event that the insured makes a claim. His role is to present his client's claim, and present it in the best way possible, to the underwriters. If the insured makes a claim, the broker endorses the policy with details of the claim and submits it to the underwriters for their consideration Often the market lead among the underwriters handles the claim, and other insurers follow the lead unless they have a major disagreement. Alternatively, the claim may be handled by the Lloyd's Underwriters' claims office, a central facility maintained by Lloyd's as a service to members. The broker presents the claim to an underwriter or to the claims office, depending upon instructions from the insured. If the underwriter or claims office does not agree to pay the claim, it may state its objections or raise questions, and the broker transmits the questions to the insured. In the event that the claim is accepted, the claim may be processed through accounting arrangements that exist between underwriters and brokers in the London market, and in such a case the broker transmits a check in the agreed amount to the insured. Alternatively, Lloyd's may transmit funds directly to the insureds. For example, insureds in the United States may be paid through a financial arrangement centered in New York.

* * *

Appendix F

Peter George Hoole LOWSLEY-WILLIAMS, individually and as a representative of Certain Underwriters at Lloyd's London, and Argonaut Insurance Co., Ltd.; Bishopsgate Insurance Company, Ltd.; City Insurance Co., Ltd., CNA Reinsurance of London, Ltd., Delta Lloyd Insurance Co., Ltd.; Dominion Insurance Company, Ltd., Instituto De Reasseguros Do Brasil; London & Edinburgh Insurance Co., Ltd.; Royal Belge Incendie-Reassurance S.A.; St. Katherine Insurance Co., Ltd.; "Winterthur" Swiss Insurance Co., Ltd., Plaintiffs.

v.

NORTH RIVER INSURANCE COMPANY and Talegen Holdings, Inc., as successor in interest to Crum & Forster, Inc., Defendants.

Civ. No. 93-5434 (WGB).

United States District Court,
D. New Jersey.

May 3, 1995.

* * *

BASSLER, District Judge:

The plaintiffs, Peter George Hoole Lowsley-Williams ("Lowsley-Williams"), individually and as a representative of certain Underwriters at Lloyd's London ("Lloyd's") and nineteen London market insurance companies, brought an action pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, seeking a declaration of the rights and obligations of the parties under certain facultative reinsurance contracts. Plaintiffs additionally seek monetary damages for breach of contract. Plaintiffs allege diversity jurisdiction under 28 U.S.C. § 1332(a)(2). Defendants move to dismiss, based upon plaintiffs' failure to meet the burden of pleading all facts relevant to diversity jurisdiction by failing to allege the citizenship of each individual reinsurer.

I. *BACKGROUND*

Defendant, North River, had seven reinsurance contracts underwritten by several syndicates at Lloyd's London. (Joint Stipulation of Facts, 178) ("Stipulation"). When the original insureds sought reimbursement from North River, North River in turn sought indemnification from the reinsurers (the syndicates of Lloyd's London). The syndicates then brought suit in this Court requesting declaratory judgment regarding their liability to pay North River pursuant to the reinsurance contracts. North River contends that this Court, due to a lack of diversity jurisdiction, does not have jurisdiction to declare whether plaintiffs must indemnify defendants.

The plaintiffs filed their complaint on December 9, 1993 and amended it on December 28, 1993 to name additional parties. Defendants have moved to dismiss the original complaint for lack of subject matter jurisdiction and have further opposed plaintiffs' Motion for Leave to File a Second Amended Complaint based on plaintiffs' alleged failure to correct the lack of subject matter jurisdiction.

In their complaint, plaintiffs made no allegations concerning citizenship of any of the Lloyd's members. In their Second Proposed Second Amended Complaint, plaintiffs modified their allegations of the citizenship of Lloyd's London and additionally alleged the citizenship of Lowsley-Williams, all Underwriters for syndicates subscribing to the policies at issue (explained, *infra),* and the various plaintiff insurance companies. Plaintiffs, however, do not allege the citizenship of each of the members in the syndicates subscribing to the policies at issue, maintaining that only the citizenship of the Underwriters and not of the individual members is critical in determining the existence of diversity jurisdiction.

The seven North River reinsurance contracts were each subscribed to by members in several syndicates at Lloyd's, as well as by several companies. (Stipulation, ¶ 78). Of the Lloyd's members subscribing to these contracts, several were and are citizens of the State of New Jersey. (Stipulation, ¶ 79).

The determination of diversity jurisdiction requires an understanding of the process of reinsurance at Lloyd's, which has been clarified by the Stipulation and Supplemental Joint Stipulation of Facts, provided to this Court in response to the Court's request. The following overview of that process is abstracted mainly from those two stipulations.

Lloyd's is an association that provides the physical premises and the administrative services and staff to enable insurance underwriters to carry on their business at the facilities. (Stipulation, ¶ 1). "Lloyd's of London is not an insurance company in the general sense. Rather, it is an exchange or a market where various individuals or groups bid on the right to insure a given risk." *Smith v. Lloyd's of London,* 568 F.2d 1115, 1117 n. 3 (5th Cir.1978) (citing Antony Brown, *Lloyd's of London* (1974)). Lloyd's takes no part in the business of underwriting, policies are underwritten at Lloyd's and not by Lloyd's. (Stipulation,

¶¶ 3-4). Thus, policyholders have no contractual relationship with Lloyd's. (Stipulation, ¶ 15).

The insurance policies underwritten at Lloyd's are underwritten by members of Lloyd's, referred to as "Names." (Stipulation, ¶¶ 7-8). Persons desiring to be Names must pay an entrance fee, keep certain deposits at Lloyd's, and meet several specific requirements, including the possession of a certain degree of wealth, in order to become Names. (Stipulation, ¶¶ 10, 66). The maximum amount that each Name may underwrite is determined in relation to the Name's wealth, in addition to other factors. (Stipulation, ¶ 11). Since Names assume unlimited liability, Names are liable to the full extent of their personal wealth for any risks undertaken. (Stipulation, ¶ 12).

For any given contract, each Name is liable only for the percentage of the risk which that Name has agreed to underwrite and for no other portion of the risk assumed by any other Name. (Stipulation, ¶ 13). The holders of policies reinsured by Lloyd's Names thus enter into contractual relationships with the specific Names who have subscribed to the policies for the portion of the risk that each Name has agreed to underwrite. (Stipulation, ¶ 9).

In order to increase the efficiency of underwriting risks and to combine the resources of numerous underwriters, Names form groups called syndicates. (Stipulation, ¶ 16). "These syndicates . . . are comprised of some 30,000 member-investors, sometimes called 'underwriters' or 'names,' who hope to share in any profit the syndicate might make." *Certain Interested Underwriters v. Layne,* 26 F.3d 39, 42 (6th Cir. 1994) (quoting *Daly v. Lime Street Underwriting Agencies Ltd.,* 2 FTLR 277, 279 (Q.B.1987)). Syndicates are neither incorporated nor are they legal entities in and of themselves. (Stipulation, ¶¶ 17-18). There is no contractual relationship among members of a syndicate, between syndicates, or between the policyholder and a syndicate. (Stipulation, ¶¶ 19-20). Syndicates do not assume liability or underwrite risks; Names do. (Stipulation, ¶ 21).

Within each syndicate, a Managing Agent is responsible for the underwriting and management of a Name's business. (Stipulation, ¶ 30). The authority of the Managing Agent is either direct, through a contract entered into between the Name and the Managing Agent, or indirect, between the Managing Agent and the Member's Agent (who acts on behalf of the Name). (Stipulation, ¶ 32).

The Managing Agent-a partnership or limited company — designates one of its employees to serve as the Active Underwriter ("Underwriter") for the syndicate. (Stipulation, ¶¶ 34-35). The Underwriter is authorized to control the risks for each Name in the syndicate which the Underwriter represents, though no Underwriter is an express trustee over funds held on behalf of any Name. (Stipulation, ¶ 37; Tr., at 22). In addition, the Underwriter determines the conditions to which a risk will be subject and what percentage of a risk will be assumed by the syndicate on behalf of the Names. (Stipulation, ¶ 37). The Underwriter also determines what percentage of a risk each Name in the syndicate will assume. (Stipulation, ¶ 37). Thus, when the Underwriter accepts a percentage of a risk, he binds every Name in the syndicate to the full extent of the Name's share. (Stipulation, ¶ 39). When it comes time to pay a claim, the Underwriter's decision binds all the Names in the syndicate, but only the Names within that syndicate. (Stipulation, ¶ 39). Each Name's liability is determined by the individual policy and the Name's participating share in the syndicate. (Stipulation, ¶ 39). The agency between a

Name and a Managing Agent is terminated when the Name ceases to be an underwriting member of Lloyd's (Stipulation, ¶ 76).

* * *

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No. 98-271

In The Supreme Court Of The United States

OCTOBER TERM, 1997

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON and
CERTAIN LONDON MARKET INSURANCE COMPANIES,
Petitioners,

v.

INDIANA GAS COMPANY, INC., RICHMOND GAS CORPORATION
d/b/a INDIANA GAS COMPANY, INC. and TERRE HAUTE GAS
CORPORATION, d/b/a INDIANA GAS COMPANY, INC., *et. al.*
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR *AMICUS CURIAE* INSURANCE ENVIRONMENTAL LITIGATION ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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BRIEF FOR *AMICUS CURIAE* INSURANCE ENVIRONMENTAL LITIGATION ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF *AMICUS CURIAE*

The lower court's ruling that, where Lloyd's Underwriters are parties, each member (or "Name") of a Lloyd's insurance syndicate must be considered in determining diversity jurisdiction threatens to restrict dramatically insurers' access to the federal courts. It will also undermine many pending insurance coverage cases.[1] This case is therefore of great practical importance to the members of the Insurance Environmental Litigation Association ("IELA"), which are most of the nation's major property-casualty insurers.[2]

---

[1] Counsel for IELA authored this brief in its entirety. No person or entity, other than IELA, its members, or its counsel, made a monetary contribution to the submission of this brief. All parties have consented to IELA's participation as *amicus curiae*. Letters of consent have been filed with the Clerk's office.

[2] Since 1986, IELA has participated as *amicus curiae* in numerous cases addressing environmentally related insurance coverage. IELA submits this proposed brief on behalf of IELA members: Allstate Insurance Company; AIG Insurance Companies; Chubb & Son – a Division of Federal Insurance Company; CIGNA Property & Casualty Companies; Continental Insurance Company; Envision Claims Management Corporation; Fireman's Fund Insurance Companies; Hanover Insurance Company; The Hartford Insurance Group; Liberty Mutual Insurance Company; Royal & Sun Alliance; St. Paul Companies; Selective Insurance Company of America; State Farm Fire & Casualty Company; The Travelers Indemnity Company; United States Fidelity & Guaranty Company; Zurich-American Insurance Group. This brief is not submitted on behalf of IELA member St. Paul Companies or Zurich-American Insurance Group.

Insurers need to be able to seek relief in federal court both to avoid in-state bias and to expeditiously resolve complex cases. In environmental cases, which often involve Lloyd's syndicates, local passions can run deep about who should pay to clean up a site. The environmental harm may alarm in-state residents and drain the treasuries of local companies and governments. Out-of-state or foreign insurers, such as IELA's members, are often seen as a "deep pocket," without local influence, capable of picking up the tab for the cleanup. In IELA's experience, although most state courts strive in good faith to produce just results, some succumb to the temptation of relieving a local governmental entity or business from the burden of cleaning up pollution without regard to the terms of insurance contracts. For example, one trial judge held that "'the health, safety and welfare of the people of [this State] must outweigh the express provisions of the insurance policy in issue.'" *See, e.g.*, *Summit Assocs., Inc. v. Liberty Mut. Fire Ins. Co.*, 550 A.2d 1235, 1239 (N.J. Super. Ct., App. Div. 1988) (reversing and quoting trial court).

A federal forum is also important because the federal courts are more suited to resolving large-scale coverage cases. These cases often involve numerous sites in multiple states and multiple states' laws. *See, e.g., Waste Management, Inc. v. Admiral Ins. Co.*, 649 A.2d 379 (N.J. 1994) (environmental coverage case involving Waste Management and 54 subsidiaries against 150 insurers concerning coverage for 97 sites in 22 states and Canada), *cert. denied*, 513 U.S. 1183 (1995); *Westinghouse Elec. Corp. v. Liberty Mut. Ins. Co.*, 559 A.2d 435 (N.J. Super. Ct., App. Div. 1989) (environmental coverage case involving 144 insurers covering 81 contamination sites in 23 states for the period of 1948-82). Federal courts are uniquely suited to handle the nationwide scope and complexity of such cases.

IELA is also interested in this case because the lower court's ruling may lead to the dismissal of large-scale pending insurance coverage actions, many of which involve Lloyd's underwriters. Accordingly, IELA has a strong interest in the Court granting review in this case.

ARGUMENT

The Court should grant the petition for a writ of certiorari. The United States Court of Appeals for the Sixth Circuit and the Seventh Circuit are divided as to whether the citizenship of all of the Underwriters of a Lloyd's syndicate must be considered in determining diversity jurisdiction. This issue is important to the administration of justice in the federal courts. For the courts to follow the Seventh Circuit's rule that each Underwriter's citizenship must be considered would seriously undermine access by *all* insurers (and policyholders) to federal courts in complex insurance coverage cases. Also, such a rule threatens to cause a vast waste of judicial resources, given that Underwriters of Lloyd's are parties in many insurance coverage cases pending throughout the federal system.

I. THE SEVENTH CIRCUIT'S RULING IS ERRONEOUS AND DIRECTLY CONFLICTS WITH A PREVIOUS RULING OF THE SIXTH CIRCUIT.

The Seventh Circuit erroneously held that the citizenship of each of the numerous Underwriters (or "Names") who collectively form a Lloyd's syndicate must be considered in determining diversity jurisdiction in a case involving such a syndicate. *See Indiana Gas Co. v. Home Ins. Co.*, 141 F.3d 314 (7th Cir. 1998). However, because only the syndicate's "Active Underwriters"—those Underwriters with control over the Names' assets—are the real parties to a controversy involving a Lloyd's syndicate, in a previous case the Sixth Circuit appropriately looked only to the Active Underwriters' citizenship, upholding diversity jurisdiction. *See Certain Interested Underwriters at Lloyd's London, England v. Layne*, 26 F.3d 39 (6th Cir. 1994). As the Seventh Circuit acknowledged, the cases are in direct conflict. *See Indiana Gas*, 114 F.3d at 319.

The Seventh Circuit held that the citizenship of each Name must be considered because it misapplied the rule in *Carden v. Arkoma Associates*, 494 U.S. 185 (1990), that the citizenship of each member of an unincorporated association must be considered when the association is a party. The court determined that the Lloyd's syndicates were parties to the case and analogized such syndicates to unincorporated associations. However, *Carden* does not apply because the syndicates were not parties; only the underwriters were named. In fact, a Lloyd's syndicate is not an unincorporated association and has no legal existence. *See, e.g., Roby v. Corp. of Lloyd's,* 796 F. Supp. 103, 111 (S.D.N.Y. 1992), *aff'd on other grounds,* 996 F.2d 1353 (2d Cir.) ("In sum: English law controls, and under English law the syndicates have no legal existence."), *cert. denied,* 510 U.S. 945 (1993). Rather, Lloyd's is "an exchange or a market where various individuals or groups bid on the right to insure a given risk." *Smith v. Lloyd's of London,* 568 F.2d 1115, 1117 n.3 (5th Cir. 1978). Because the case did not involve an unincorporated association as a party, the Seventh Circuit should have applied the rule in *Navarro Savings Ass'n v.*

Lee, 446 U.S. 458 (1980). That case holds that, when determining diversity jurisdiction in cases not involving associations or partnerships, only the citizenship of the "real party to the controversy" matters.

As the Sixth Circuit correctly determined, because the syndicates are not parties and the Active Underwriters are real parties to the controversy, only their citizenship must be considered. The Active Underwriters are real parties to the controversy because they have the sole power to "hold, manage and dispose of [the] assets" of the Names, and are personally liable on a policy. *See Navarro,* 446 U.S. at 464. The Active Underwriters of the syndicate have the sole authority to bind the Names of the syndicate and to carry on the affairs of the syndicate's members. *See generally* Pet. Cert., pp. 3-4 (describing Lloyd's and the London insurance market); *see also Boobyer v. Holman & Co.,* Queen's Bench Division (Commercial Court), 1 Lloyd's Rep. 96 (1992). By contrast, the Names who are members of a Lloyd's syndicate often number in the thousands. Like investors in a corporation, they merely contribute their wealth to a part of the risk underwritten by the syndicate. Accordingly, the Seventh Circuit erred in failing to apply *Navarro,* which mandates consideration only of the Active Underwriters' citizenship.

Indeed, before the decision below, many courts reached the merits of cases predicated on diversity jurisdiction and involving Lloyd's Underwriters as parties. For example, in *Wilton v. Seven Falls Co.,* 515 U.S. 277 (1995), this Court rendered a decision in a case involving Underwriters of numerous large Lloyd's syndicates. Many courts of appeals have also considered the merits of diversity cases involving Lloyd's Underwriters without questioning jurisdiction. *See* Pet. Cert., p. 17 n.14 (citing cases in each of the courts of appeals). In *Smith*, the Fifth Circuit reached the merits of a case involving Lloyd's Underwriters after correctly describing Lloyd's as "an exchange or market." 568 F.2d at 1116 n.3. Undoubtedly, under the rule announced by the Seventh Circuit, many (if not the vast majority) of these cases should have been dismissed.

The conflict between the Sixth and Seventh Circuits is important to resolve. The Seventh Circuit's erroneous decision threatens to strip the federal courts of diversity jurisdiction where it is most appropriate, in complex cases that typically involve sites in multiple states, parties from various states, and multiple states' laws. It may also lead to the dismissal of pending cases across the country and, at the very least, will produce uncertainty in litigation involving the commitment of substantial judicial resources. Accordingly, the decision below merits this Court's review.

II. THE LOWER COURT'S DECISION THREATENS TO DENY A FEDERAL FORUM TO ALL INSURERS IN MANY INSURANCE COVERAGE CASES, WHERE FEDERAL JURISDICTION SERVES AN IMPORTANT PURPOSE.

If not reversed, the decision below will unjustifiably restrict many insurers from having access to the federal courts in large-scale insurance coverage cases. The decision affects the *entire* insurance industry, not just Lloyd's or the London Market insurers. If Lloyd's Underwriters cannot be joined in an insurance coverage case, a federal court almost certainly would not proceed with the case where all parties have been joined in a parallel state court proceeding, because the state court action will be more comprehensive. *See, e.g.*, *Wilton,* 515 U.S. at 283 (quoting *Brillhart v. Excess Ins. Co. of Am.,* 316 U.S. 491, 495 (1942) for the proposition that a federal court's decision to proceed under the Declaratory Judgment Act involves consideration of "whether the claims of all parties in interest can satisfactorily be adjudicated in [a state court] proceeding"). Because policyholders routinely file competing state actions to take advantage of a local forum, *all* insurers will be deprived of the protections afforded by federal diversity jurisdiction in many important cases.

The concerns leading the Framers to authorize federal diversity jurisdiction in the Constitution were "that state attachments, state prejudices, state jealousies, and state interests, might some times obstruct, or control ... the regular administration of justice," *Martin v. Hunter's Lessee,* 14 U.S. (1 Wheat.) 304, 347 (1816). "Diversity jurisdiction is founded on the assurance to non-resident litigants of courts free from susceptibility to potential local bias." *Guaranty Trust Co. of N.Y. v. York,* 326 U.S. 99, 111 (1945); *see also Erie R. Co. v. Tompkins,* 304 U.S. 64, 74 (1937) ("Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state."). As IELA reviews below, these concerns are just as important today.

Studies repeatedly show that lawyers, and even federal judges, continue to perceive state court bias against out-of-state and alien interests, particularly those with "deep pockets." The experience of insurers in state courts confirms this impression. Although most state judges work in good faith to achieve just results, insurers continue to experience injustices apparently explainable only by a bias in favor of local interests. In addition, state courts are more crowded and generally less well-equipped. Accordingly, if left standing, the Seventh Circuit's rule will affect important rights beyond those of the Lloyd's Underwriters.

A. Preserving Access to a Federal Forum is Important in Insurance Coverage Cases Because Out-of-State and Foreign Parties Perceive Some State Courts As Continuing to Manifest Bias Against Them.

The concerns that motivated the Founders to vest diversity jurisdiction in the federal courts, and that have motivated Congress consistently to retain it, still exist today. The lower court's decision will strip insurers of this important safeguard against local bias.

Since 1789, Congress has vested the federal courts with the responsibility of ensuring fairness in litigation between a local entity and an out-of-state party, whether foreign or domestic. *See Martin,* 14 U.S. (1 Wheat.) at 347; *Guaranty Trust,* 326 U.S. at 111; *Erie,* 304 U.S. at 74. Given the history of state bias against out-of-state interests, and selective enforcement of national laws, delegates to the Constitutional Convention of 1787 were highly conscious of the inadequacies and prejudices of state courts. As one delegate noted, "the Courts of the State can not be trusted with the administration of the National laws." J. Madison, *Notes on the Debates in the Federal Convention of 1787,* 319 (Norton 1987) (comments by Randolph). Exercising its mandates under Article III of the Constitution, when the First Congress convened in 1789, it immediately created the federal courts and vested them with jurisdiction in cases "where an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another state." Judiciary Act of 1789, Ch. 20, § 11-12, 1 Stat. 73, 78, 79.

Despite repeated attacks on diversity jurisdiction, Congress has preserved and reaffirmed its central and original feature: that citizens of different states or countries be given the right to sue in federal court. *See Powell v. Offshore Navigation, Inc.*, 644 F.2d 1063, 1066 (5th Cir. (Unit A) ("Over the years Congress has repeatedly re-enacted or amended the statute conferring diversity jurisdiction ...."), *cert. denied*, 454 U.S. 972 (1981). The concern that corporations, such as insurers, are targets of in-state bias has been an important reason behind Congress's steadfast retention of diversity jurisdiction. *See City of Ketchikan v. Cape Fox Corp.*, 85 F.3d 1381, 1384 (9th Cir. 1996) ("The underlying purpose of diversity jurisdiction is to protect out-of-state corporations from local prejudice.") (citing S. Rep. No. 1830, 85th Cong., 2d Sess. 4 (1958)).

These concerns remain important. Authoritative studies have repeatedly documented the widespread perception that state courts are biased against out-of-state and foreign parties. One comprehensive 1992 study reported that fifty-four percent of *plaintiffs'* attorneys reported bias against defendants in state court. Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 Am. U. L. Rev. 369, 408-09 (Winter 1992). More than half of such plaintiffs' lawyers (51%) ascribed this bias to the defendant's out-of-state status. *Id.* Slightly less than half (45%) explained that the defendant's identity as a business or corporation gave rise to prejudice. A Minnesota study also found bias against the nature of the client to be the most important reason lawyers pursued their remedy in federal court. The third most important reason was prejudice against out-of-state interests.

Douglas D. McFarland, *Diversity Jurisdiction: Is Local Prejudice Feared?*, 7 Litigation 38, 40 (Fall 1980). Almost half (45%) of plaintiff's lawyers chose to litigate in state court based on their belief that the state court would be biased in their favor. Miller, 41 Am. U. L. Rev. at 408-09. Not surprisingly, perhaps, attorneys representing insurance companies were most likely of all defense attorneys to report out-of-state bias (59%). *Id.* at 413.

Historically, other studies have reported similar results. A Virginia survey found that more than 60% of attorneys said that local prejudice against out-of-state plaintiffs was a reason for choosing federal courts. Note, *The Choice Between State and Federal Court in Diversity Cases in Virginia,* 51 Va. L. Rev. 178, 179 (1965). Forty percent of Chicago lawyers believed that fear of local prejudice was at least somewhat important in choosing federal court. K. Marks, *Honors Paper at Northwestern University*, printed in *Hearings on H.R. 9622 before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 265, 267 (1978).

Judges share this perception of prejudice. A 1992 survey conducted by the Federal Judicial Center found that many federal judges believe state courts still are biased against non-resident litigants. Forty-eight percent of circuit judges and 40% of district judges believed that state court bias was at least somewhat of a problem. Federal Judicial Center, *Planning for the Future: Results of a 1992 Federal Judicial Center Survey of United States Judges*, at 4, 26 (1994). Thus, it appears that the perception of state court bias that motivated the adoption of federal diversity jurisdiction remains.

In reality as well as perception, insurers have repeatedly been subjected to judicial determinations that appear explainable only by a state court's desire to find a deep pocket to reimburse local policyholders. This is especially true in cases addressing the availability of insurance coverage for large environmental cleanup projects. Such decisions have been strongly encouraged by local interests that may be harmed by pollution.

For example:

- The Wisconsin Assembly Committee on Natural Resources wrote the Wisconsin Supreme Court asking it to reconsider an insurance coverage decision on public policy grounds. A decision denying coverage, the Committee said, would "have a serious adverse effect upon state efforts to remediate contaminated sites." Letter from Wisconsin Assembly Committee on Natural Resources to Chief Justice Nathan S. Heffernan, Wisconsin Supreme Court (Aug. 4, 1994) (regarding *City of Edgerton v. General Casualty Co.*, 517 N.W.2d 463 (Wis. 1994), *cert. denied*, 514 U.S. 1017 (1995)).

- The Pennsylvania Attorney General urged the Pennsylvania Superior Court to affirm a trial court, in part "[b]ecause this is an age of limited public finances, [and] this funding must come from the private sector, . . . in this instance funds should flow both from manufacturers and from the insurance industry . . . ." Brief of *Amicus Curiae* Commonwealth of Pennsylvania, Department of Environmental Resources at 1-2, *Lower Paxton Township v. United States Fidelity and Guar. Co.*, 557 A.2d 393 (Pa. Super Ct. 1989) (No. 141 Harrisburg 1988).

- New Jersey's Department of Environmental Protection urged the New Jersey Supreme Court to decide an insurance coverage case in a manner "that will be consistent with the state's broad responsibility to remediate past contamination ...." Supplementary Brief of Respondent State of New Jersey, Department of Environmental Protection at 3, *State of New Jersey v. Signo Trading Int'l, Inc.* 570 A.2d 980 (N.J. 1989) (No. 30,960), *aff'd*, 612 A.2d 932 (1992).

These entreaties can place enormous pressure on state judges, who in 29 states are subject to popular election. *See* National Center for State Courts, *Examining the Work of State Courts, 1994*, at 16 (1996). Perhaps in part because of this pressure, state courts have at times succumbed to the temptation to have out-of-state and foreign insurers pick up the tab for cleaning up the environmental mess in their own backyard. *See, e.g., Summit Assocs.*, 550 A.2d at 1239 (reversing trial court holding that "the health, safety and welfare of the people of this State must outweigh the express provisions of the insurance policy at issue"). Yet, the orderly workings of insurance as an international economic mechanism allowing society to absorb massive risks depends on the reliability of insurance policy terms. In some recent state court cases, however, these considerations have taken a back seat to the desire to fund large local expenditures from an out-of-town source.

A few examples demonstrate that state court bias remains a valid concern today:

- In *Greenville County v. Insurance Reserve Fund*, 443 S.E.2d 552 (S.C. 1994), the South Carolina Supreme Court held that, because there is more than one meaning listed for the word "sudden" in the dictionary, the term is ambiguous and must be construed against the insurer. *Contra MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218 (1994).

- In *Morton International, Inc. v. Insurance Co. of North America*, 629 A.2d 831 (N.J. 1993), *cert. denied*, 512 U.S. 1245 (1994), the New Jersey Supreme Court barred insurers from ever enforcing an exclusion that had been part of many insurance agreements since 1970, when it had been approved by New Jersey's insurance regulators. The court based its "findings" that insurers had duped the regulators into allowing the exclusion on biased and partisan articles written by counsel for policyholders. These articles and other materials were submitted for the first time on appeal, and were never subjected to discovery, cross-examination, or any of the other rules of evidence.

- In *Duhon v. Nitrogen Pumping & Coiled Tubing Specialists, Inc.*, 611 So.2d 158 (La. Ct. App. 1992), despite a provision barring coverage for all actions that "result from the Assured's intentional and willful violation of any government statute, rule or regulation," the court found coverage of a suit in which the underlying claimants alleged that

> the policyholder was guilty of illegal and intentional pollution. *Id.* at 160 (Stoker, J., dissenting).

As these cases demonstrate, insurers have reason to persist in the belief that access to a federal forum is needed. As one commentator concluded, after surveying state court insurance rulings, many "supreme tribunals allow extralegal factors, which have little to do with the merits of the suits, to influence the disposition of insurance-related cases." *See* Willy E. Rice, *Judicial Bias, The Insurance Industry And Consumer Protection: An Empirical Analysis of State Supreme Courts' Bad Faith, Breach Of Contract, Breach-Of-Covenant-Of-Good-Faith And Excess-Judgment Decisions, 1900-1991*, 41 Cath. U. L. Rev. 325, 331 (Winter 1992). In addition, "state supreme court justices unintentionally allow the types of insureds to influence the disposition of . . . actions." *See id.* at 369.

Moreover, insurers face the same problem outside the environmental context. Most notably, some state courts have abused the interpretive principle that contracts are construed against the drafter to justify anti-insurer rulings that simply ignore the terms of the agreement. For example, in *Ponder v. Blue Cross*, 193 Cal. Rptr. 632 (Ct. App. 1983), a California appellate court held that a claimant could recover for costs relating to treating TMJ (temporomandibular joint syndrome) despite a provision in her policy stating that benefits would not be provided for "the treatment of temporomandibular joint syndrome or disease." *See also, e.g., Northwest Airlines, Inc. v. Globe Indem. Co.*, 225 N.W.2d 831, 837 (Minn. 1975) (holding that policy language should be construed against insurers because "the very fact that the [parties'] respective positions as to what this policy says are so contrary compels one to conclude that the agreement is indeed ambiguous. The rule is well settled that ambiguous language should be strictly construed in favor of the insured.").

The availability of a federal forum is therefore important to protect the rights of insurers. Because the lower court's decision will broadly undermine the rights of insurers throughout the nation, it merits the Court's review.

B. Federal Courts are in a Better Position to Hear Complex Environmental Coverage Actions Than State Courts.

The lower court's rule will also prevent federal courts from serving their important function of facilitating the comprehensive resolution of complex insurance cases.

Complex environmental cases involving numerous parties and high stakes are appropriate to resolution by the federal courts. Environmental coverage cases frequently involve many parties, numerous geographically dispersed polluted sites, the law of multiple jurisdictions, and high stakes. *See, e.g., Waste Management,* 649 A.2d 379 (involving claim against 150 insurers for 97 sites in 22 states and Canada); *Westinghouse,* 559 A.2d 435 (144 insurers covering 81 contaminated sites in 23 states for the period 1948-82). Although state courts may be capable of handling such suits, these are precisely the types of cases over which the federal courts should exercise jurisdiction. Yet the rule adopted below would leave insurers without access to the federal courts in the most complex cases, which will often involve Lloyd's Underwriters. *See* text, pp. 6-7, *supra.*

Federal courts are widely perceived as more suited to handle complex disputes. In one Chicago survey, ninety-two percent of lawyers ranked the ability of federal judges as the primary reason to litigate in federal courts. K. Marks, *Honors Paper at Northwestern University*, printed in *Hearings on H.R. 9622 Before the Subcomm. on Improvements in the Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 265 (1978). In the same survey, the second reason, cited by ninety percent, was the federal courts' more current calendar. *Id.* Federal courts are generally faster than state courts. Although most states disposed of fewer cases than were filed with them from 1994 to 1996, National Center for State Courts, *Examining the Work of State Courts, 1996* at 23 (1997), federal courts cleared more cases than entered their system in each year during the same period. Administrative Office of U.S. Courts, *Judicial Business of the United States Courts,* Report of the Director at 18, 23 (1996).

Accordingly, it is important for the Court to grant review here, given the serious effect the case will have on the orderly prosecution of large-scale nationwide insurance litigation.

III. THE SEVENTH CIRCUIT'S RULE WILL LEAD TO A VAST WASTE OF JUDICIAL RESOURCES IF FOLLOWED.

If the lower court's rule were followed, the many diversity cases pending throughout the federal system that include Lloyd's underwriters as parties will be vulnerable to dismissal. This will lead to a substantial waste of judicial resources.

Nearly seventy district court opinions involving such cases were issued after 1995 alone.[3] Because such cases involve so many separate syndicates, each with many members who are typically scattered throughout the various states, it is likely that many of these cases are subject to dismissal under the rule announced by the lower court. Years of judicial resources may be wasted if such cases are dismissed. *See, e.g., K. Bell & Associates, Inc. v. Lloyd's Underwriters,* No. 92 Civ. 5249, 1998 WL 274346 (S.D.N.Y. May 26, 1998) (dismissing case after six years of litigation based on lack of diversity jurisdiction, following *Indiana Gas*). Indeed, this case illustrates the considerable waste that the Seventh Circuit's rule will produce. In three years of litigation, no party to the case—each with experienced appellate and coverage counsel—raised the jurisdictional issue. After considerable expense and consuming substantial judicial resources, the Seventh Circuit's ruling would force the parties to pursue the case anew in state court.

The likelihood of such a vast waste of judicial resources is a compelling reason to review this case. Granting the petition for certiorari is therefore justified by the importance of the issue to the sound administration of justice in the federal courts.

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[3] IELA reviewed cases via electronic database. The nearly seventy cases referred to here are ones in which London Market insurers or Lloyd's insurers appeared as parties in the case caption of an opinion published on-line. Many more cases may be pending where either an opinion has not been published or where Lloyd's or London Market insurers do not appear in the opinion's case caption.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 98-271

In the Supreme Court of the United States

OCTOBER TERM, 1997

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON AND
CERTAIN LONDON MARKET INSURANCE COMPANIES,
PETITIONERS

v.

INDIANA GAS COMPANY, INC., RICHMOND GAS CORPORATION
d/b/a INDIANA GAS COMPANY, INC., AND TERRE HAUTE GAS
CORPORATION d/b/a INDIANA GAS COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS INDIANA GAS COMPANY, INC., RICHMOND GAS CORPORATION, AND TERRE HAUTE GAS CORPORATION

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RULE 29.6 STATEMENT

Respondent Indiana Gas Company, Inc. is a wholly-owned subsidiary of Indiana Energy, Inc., a publicly held corporation traded on the New York Stock Exchange. Respondents Richmond Gas Corporation and Terre Haute Gas Corporation are wholly-owned subsidiaries of Indiana Gas Company, Inc.

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In the Supreme Court of the United States

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STATEMENT

Respondents Indiana Gas Company, Inc., Richmond Gas Corporation, and Terre Haute Gas Corporation (collectively "Indiana Gas") respectfully oppose the petition for a writ of certiorari.[1] Indiana Gas agrees with petitioners ("London") that the decision of the Seventh Circuit is erroneous and that the citizenship of a Lloyd's Syndicate for purposes of diversity jurisdiction is determined by the citizenship of the Active Underwriter rather than by the citizenship of each individual Name in the Syndicate. Moreover, Indiana Gas agrees, as the Seventh Circuit itself acknowledged (Pet. App. 9a-11a & n.†), that the decision below conflicts with the holding in *Certain Interested Underwriters at Lloyd's* v. *Layne*, 26 F.3d 39 (6th Cir. 1994). Nonetheless, Indiana Gas urges that this case does not warrant further review and accordingly that certiorari be denied.

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[1] As explained in the petition (Pet. ii), various non-London insurance companies were named as defendants in the district court and were appellees in the court of appeals. These non-London insurers are not petitioners in this Court and are not included in this brief in opposition filed by Indiana Gas. See Sup. Ct. R. 12.6, 24.1(b).

REASONS FOR DENYING THE WRIT

Despite the erroneous decision below and the existence of a circuit conflict, Indiana Gas submits that it is neither necessary nor appropriate for the Court to take up this case to resolve the legal issue presented by London.

First, there is nothing in the circumstances of this case that would call for further review. The Seventh Circuit's jurisdictional decision had the effect of vacating the district court's various rulings that incorrectly granted summary judgment against Indiana Gas. Moreover, following the Seventh Circuit's decision, Indiana Gas as the plaintiff below has re-filed its complaint in Indiana state court. See *Indiana Gas Co.* v. *Home Ins. Co.,* No. 79D02-9806CP100 (Tippecanoe, Ind. Super. Ct. No. 2, filed June 9, 1998).[2] That pending suit is fully adequate to resolve the insurance coverage dispute between the parties under Indiana law and raises no issue of federal diversity jurisdiction. Accordingly, in light of Indiana Gas's filing of that suit, adjudication of the controversy between the parties does not require this Court's intervention.

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[2] London has filed its answer in that case and moved to stay proceedings pending this Court's disposition of its petition for certiorari.

Second, as the petition indicates, the question of the citizenship of a Lloyd's Syndicate for purposes of diversity jurisdiction has been decided by only the Sixth and the Seventh Circuits. Decisions of other courts of appeals in addition to *Layne* and the ruling below would be of substantial assistance to this Court in analyzing the question presented. This is particularly so since London relies on the holding in *Layne* to establish a conflict but expressly disavows the Sixth Circuit's legal analysis. See Pet. 16 n.12. Likewise, in the Seventh Circuit, Indiana Gas and London agreed that there was diversity of citizenship among the parties but advanced different legal rationales. In these circumstances, further analysis and clarification of the issue in the courts of appeals would benefit this Court's consideration. As the petition notes (Pet. 13), the issue currently is pending in several cases in the Second and Third Circuits. Those decisions are likely to better illuminate the question presented for the Court and provide suitable vehicles for the prompt resolution of this issue.

Third, London's position on the citizenship of a Lloyd's Syndicate appears to turn on the antecedent proposition that the Seventh Circuit erred in concluding that the individual Names were not and could not be defendants in litigation under the insurance policies. Indeed, no fewer than five times in its 10-page argument does London assert this point (Pet. 14, 14-15 n.11, 17, 20 & n.18), and stresses that it was "[t]his misunderstanding" over the Names' status that "led" the court of appeals to its erroneous analysis of the citizenship of a Lloyd's Syndicate. *Id.* at 14. However, the question whether individual Names were and could be sued as defendants was not briefed by London in the court below (or, for that matter, in its petition for certiorari in this Court).

Moreover, the issue appears to be entirely a question of English law. See Pet. 5a, 6a, 9a-10a. Thus, whether or not London is ultimately correct on that issue, the fact that it was not briefed in the court of appeals, and that London's position on the question presented in the petition depends upon resolution of a precedent issue of English law that is not itself certworthy, strongly militate against further review here.

Fourth, with respect to the second question presented involving Fed. R. Civ. P. 23.2, this Court's review is not called for. To begin with, this issue was not raised in the court of appeals until London's rehearing petition and therefore was not adequately preserved.[3] Although London now tries to defend its belated assertion of the issue below (Pet. 19-20 & n.16), there is no reason why London could not have raised it as an alternative argument in its initial post-argument brief on the question of diversity jurisdiction. See S. Ct. R. 15.2.

Nor, contrary to London's characterization (Pet. 19), did the court of appeals relieve London of this procedural default by deciding the issue on the merits. Rather, the court held that London's argument had been "forfeited" (Pet. App. 94a) and then went on to "add" that the argument was unavailing in any event. *Ibid.* Such an alternative ruling does not forgive London's waiver, and the court of appeals' waiver analysis constitutes an adequate ground independent of the merits for its rejection of London's Rule 23.2 argument. Indeed, the only reason the Seventh Circuit addressed the merits at all was not to benefit or excuse London but instead to forestall "another round of litigation" in which Indiana Gas as the plaintiff would seek to rely on

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[3] For this reason, Indiana Gas took no position on the Rule 23.2 issue.

Rule 23.2 to establish federal jurisdiction for its complaint. *Ibid.*

Finally, the court of appeals correctly observed that Indiana Gas's complaint simply "did not use Rule 23.2." Therefore, whatever the merits of London's argument might be in the abstract, it has no bearing here because "Rule 23.2 was not used * * * in this case, and that is that." Pet. App. 94a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 98-271

In The

Supreme Court of the United States

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October Term, 1997

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON and CERTAIN LONDON MARKET INSURANCE COMPANIES,

Petitioners,

vs.

INDIANA GAS COMPANY, INC., RICHMOND GAS CORPORATION d/b/a INDIANA GAS COMPANY, INC. and TERRE HAUTE GAS CORPORATION d/b/a INDIANA GAS COMPANY, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

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STATEMENT

Petitioners, Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies, submit this brief in reply to the opposition filed by Respondents to the Petition for Writ of Certiorari.

The most significant statements in Respondents' Brief in Opposition are their concessions that: (a) the decision of the court below is incorrect; and (b) there is a direct conflict between the circuit courts in this jurisdictional issue with respect to which there is a great deal of continuing litigation.[1] For example, counsel has become aware of a Central District of California case involving Underwriters at Lloyd's which was dismissed for lack of diversity jurisdiction. *National Am. Ins. Co. of California, et al. v. Certain Underwriters at Lloyd's, London*, No. 97-6095 CM (C.D. Cal. July 28, 1998). Indeed, the very day that this Petition for Writ of Certiorari was docketed by the clerk, the District Court of New Jersey ruled that each Name's citizenship had to be considered in determining diversity. *Trian Group, Limited Partnership et al. v. Accident and Casualty Ins. Co. of Winterthur*, Civil Action No. 98-1026 (D.N.J. August 12, 1998). The district court in that case permitted discovery to be taken to determine with specificity which of the London Market policies were subscribed by non-diverse Names and, if appropriate, to file an amended complaint excluding claims related to such policies. Thus, absent this Court's decision on the issue, there will be continued turmoil in the federal courts on this jurisdictional question.

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[1] To the extent it is a concern, this Court may appoint an *amicus* to represent the interests of the Seventh Circuit in defending the decision below. *United States v. Providence Journal,* 485 U.S. 693, 703 (1988).

1. Respondents' first ground for opposition, that Indiana Gas has simply refiled its complaint in state court, is wholly beside the point. Petitioners wish to be in federal court, and the question whether they are entitled to a federal forum is in no way mooted by the state court action.[2] The injury here is the loss of Petitioners' right to a federal forum, as well as the necessity of having to relitigate a fully litigated case. Petitioners had judgment absolute in their favor in the court below.

2. Respondents' second point is that certiorari should not be granted because the issue of diversity jurisdiction involving Lloyd's Underwriters has now been briefed, argued, and submitted for decision in the Second and Third Circuits. As noted above, this is not the kind of issue that justifies continued uncertainty while the question is being litigated in a number of courts. Despite Respondents' efforts to suggest otherwise, the relevant facts are not in dispute; the question is the legal significance of those facts. The sooner the lower courts receive guidance from this Court, the better.

3. As to Respondents' third point, the misunderstanding of the court below is one that is readily apparent on the record. Respondents err when they suggest that the issue of whether or not the Names were defendant parties was not briefed below; in fact, Petitioners took the position that the Syndicates could *not* be parties as they have no legal existence, that the Names were the subscribing parties to the Lloyd's policies of insurance, and that Indiana Gas sued *Certain Underwriters* at Lloyd's, not Syndicates at Lloyd's. (Memorandum in Support of London Market Insurers' Motion to Amend the Amended Answer, at 7-9; London Market Insurers' Petition for Rehearing, at 1; Petition for Writ of Certiorari at 14, 17). Indiana Gas recognized

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[2] In fact, on September 22, 1998 the Tippecanoe Superior Court No. 2 orally granted Petitioner's Motion to Stay the state court action pending disposition of federal proceedings. An order is being submitted.

that the Names were parties when it sought to dismiss the non-diverse Name from the litigation. Pet. at 9, App. at 5a.

The Seventh Circuit's unsupported citation to unspecified "English law" as supporting the proposition that the Names could not be sued in England may have contributed to its perception that Indiana Gas was not suing the Names in this case.[3] The record speaks for itself; in any event, whether or not Names may be procedurally parties *in England* has nothing to do with their status as parties in this Court.

Thus, the misunderstanding below, while important, is not one that renders the case in any respect "fact-bound" or inappropriate for plenary review. *Cf. California v. Carney*, 471 U.S. 386, 396 (1985) (Stevens, Brennan and Marshall, J.J., dissenting).

4. Respondents next contend that the second question presented for review was not properly before the court of appeals because it was raised for the first time in the petition for rehearing. While it is correct that arguments not contained in an appellate brief will not normally be considered, it must be kept in mind that subject matter jurisdiction was not an issue until *after* the appeal was briefed. Since neither Respondents *nor* Petitioners contended that the syndicates were unincorporated associations, the first time the issue of Fed. R. Civ. P. 23.2 was presented was when the original decision of the court of appeals was rendered.

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[3] The Seventh Circuit may have been confused by cases in which an English court forbade a Name from proceeding contrary to the contracts under which complete claims control, including control over litigation, had been delegated to the managing agent. *Daly v. Lime Street Underwriting Agencies Ltd.*, [1987] 2 FTLR 277 (Q.B.). If anything, such decisions would militate in favor of recognizing the Active Underwriters as analogous to *Navarro* trustees.

Moreover, the issue of subject matter jurisdiction is one of the exceptions to the general rule against new grounds being advanced in a petition for rehearing. *Escobar Ruiz v. Immigration and Naturalization Serv.*, 813 F.2d 283, 286 n.3 (9th Cir. 1987), *reh'g granted,* 838 F.2d 1020 (9th Cir. 1988). Since a court of appeals has an "obligation to explore any promising avenue to the District Court's jurisdiction, whether or not it is suggested by the parties", *Association of Am. Medical Colleges v. California*, 569 F.2d 101, 111 (D.C. Cir. 1977); *Curley v. Brignoli, Curley & Roberts Associates,* 915 F.2d 81, 85 (2d Cir. 1990), *cert. denied,* 499 U.S. 955 (1991), the issue of the applicability of Rule 23.2 had not been waived and was appropriately raised in the petition for rehearing. Moreover, the court of appeals had the authority to consider the issue *sua sponte* (as did the Second Circuit in *Brignoli*[4]). Indeed, as the court of appeals could have amended the complaint *sua sponte,* even though Indiana Gas had not used Rule 23.2 initially, it did not preclude the Seventh Circuit's consideration of the issue.

Perhaps recognizing this, the court below fully considered the merits of the argument. It is thus ripe for this Court's review.

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[4] *Brignoli*, 915 F.2d at 87. Similarly, this Court has considered grounds not originally advanced in the certiorari briefing when the ground is a "predicate to an intelligent resolution" of the case, and is "fairly included therein", citing to S. Ct. R. 14.1. *Ohio v. Robinette*, 117 S. Ct. 417, 420 (1996); *Caterpillar v. Lewis*, 117 S. Ct. 467, 476 n. 14 (1996).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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